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GRADGRIND'S EDUCATION: USING DICKENS AND  
ARISTOTLE TO UNDERSTAND (AND REPLACE?)  
THE BUSINESS JUDGMENT RULE\*

*Kent Greenfield<sup>†</sup> and John E. Nilsson<sup>††</sup>*

Charles Dickens's *Hard Times* includes one of the most memorable introductions in literature. It is offered by Thomas Gradgrind, the teacher at the M'Choakumchild School:

Thomas Gradgrind, sir. A man of realities. A man of fact and calculations. A man who proceeds upon the principle that two and two are four, and nothing over. . . . With a rule and a pair of scales, and the multiplication table always in his pocket, sir, ready to weigh and measure any parcel of human nature, and tell you exactly what it comes to. It is a mere question of figures, a case of simple arithmetic.<sup>1</sup>

It is apparent from this single excerpt that Dickens's portrayal of Gradgrind has much to do with the fallacies of the Benthamite political economy of his era.<sup>2</sup> The literary philosopher Martha Nussbaum suggests that Dickens's critique of that philosophy is still current, however, and indeed that "Gradgrind economics has an even greater hold over the political and intellectual life of [our] society than it did over the society known to Dickens's characters, or to the narrating voice in his novel."<sup>3</sup> This is because, Nussbaum contends, many of the "rational choice" models of behavior that have gained ac-

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<sup>1</sup> CHARLES DICKENS, *HARD TIMES* 10 (Kate Flint ed., Penguin Books 1995) (1854).

<sup>2</sup> See, e.g., Robin Glimour, *The Gradgrind School: Political Economy in the Classroom*, 11 VICTORIAN STUD. 207-24 (1967).

<sup>3</sup> MARTHA C. NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* 8 (1995) [hereinafter NUSSBAUM, *POETIC JUSTICE*].

ceptance, even a sort of hegemony, in critical scholarship "derive, ultimately, from the utilitarianism known to Mr. Gradgrind."<sup>4</sup> Gradgrind's utilitarianism is especially pervasive in corporate law, and Dickens's critique of it can be used to bring a powerful attack against existing corporate law doctrine.

Dickens's novel follows Thomas Gradgrind, his family and acquaintances, and the people of Coketown, the nineteenth century English milltown where the Gradgrinds live. *Hard Times* is not an intricate novel, yet it hardly lacks for compelling substance. Gradgrind's daughter, Louisa, suffers through a loveless, arranged marriage to one of the town's magnates, Josiah Bounderby, and then falls in love with a manipulative Lothario, who toys with her emotions. One of Bounderby's employees, Stephen Blackpool, cares for his sickly wife, who has recently returned from years of profligacy. Bounderby later fires Blackpool when the latter attests to the indignities suffered by the factory workers, or "Hands." Gradgrind's son, Tom, is an inveterate gambler who eventually robs Bounderby's bank. To avoid suspicion, Tom frames Blackpool, who has since left Coketown. The town eventually learns the truth but only after Blackpool dies trying to return to Coketown to clear his name. The novel ends with Gradgrind in emotional anguish, attempting to help his daughter escape a failed marriage and prevent his son's capture.

Dickens uses the character of Thomas Gradgrind to critique the ethic of utilitarianism. Gradgrind not only advocates utilitarianism's theory of mathematical rationalism but also acts it out in his everyday life. Over the course of the novel, however, Gradgrind learns that he cannot sustain his fierce rationalism, admitting at the novel's close, "I mistrust myself now."<sup>5</sup> Nussbaum ascribes this aspect of the character to "his failure to be the sort of person his utilitarian theory represents."<sup>6</sup> It may be more than that, though. It may be also that Gradgrind has undergone a sort of education at the hands of the author, one as to the proper basis for judgment. By the novel's end he not only mistrusts his own ability to be the sort

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<sup>4</sup> NUSSBAUM, POETIC JUSTICE, *supra* note 3, at 14.

<sup>5</sup> DICKENS, *supra* note 1, at 226.

<sup>6</sup> NUSSBAUM, POETIC JUSTICE, *supra* note 3, at 30.

of person, and to act in the sort of way, that his ethical theory requires; he also begins to mistrust the theory itself.

This Article urges that Gradgrind and Gradgrind's education serve as useful metaphor for understanding one of corporate law's persistent paradoxes: the vitality of the business judgment rule ("BJR") in the face of the director's fiduciary duty to maximize shareholder profits. This Article offers a new explanation for this paradox, drawing on Gradgrind's education as both an analogy and a point of departure. Part I of this Article examines *Hard Times* and, in particular, the critique of utilitarianism that Gradgrind's "education" represents. Part II analyzes the fiduciary duty of managers to maximize profits, characterizing that duty as the progeny, even an embodiment, of the sort of irrational utilitarianism critiqued by Dickens. Part III describes more fully the puzzle posed by the business judgment rule, and sketches the dominant theories explaining it. These theories have espoused that the BJR is based on institutional concerns about courts' abilities to second-guess corporate management. We then offer an alternative explanation, analogizing the BJR to the more rational, empirical and humanistic conception of decisionmaking about which Gradgrind is educated. This alternative conception of decisionmaking, suggested by Dickens, has been described in some detail by Nussbaum, who characterizes it as Aristotelian in nature. Part IV of this Article asks whether the business judgment rule is not, in fact, a "second best" alternative insofar as it retains the fiduciary duty to maximize profits as a guidepost. Finally, Part V suggests the contours of a "first-best" conception of fiduciary duties within corporate law—one that replaces the guidepost of shareholder return with others premised on Neo-Aristotelian notions of rationality.

## I. GRADGRIND'S EDUCATION: THE IRRATIONALITY OF UTILITARIANISM

This Part will discuss *Hard Times*'s powerful critique of utilitarianism, examining in particular the "education" in decisionmaking Gradgrind's character undergoes in *Hard Times*. This Article will later argue that the Benthamite utilitarianism that is the subject of Dickens's attack is the theoretical ancestor of the modern duty in corporate law to maximize

shareholder profits. This insight will provide the basis for a new explanation of the business judgment rule.

### A. *Gradgrind's Education*

Literary critic F.R. Leavis took the position that, among all Dickens's novels, *Hard Times* alone ranked in the "great tradition" of English literature.<sup>7</sup> Surely, one of the key elements of the novel's richness is the character of Thomas Gradgrind, who is comic (in the best Dickensian tradition), yet not static. Indeed, one might argue that Gradgrind's evolution as a character—his growth away from a righteous certainty—is the novel's real engine. As social commentary, *Hard Times* is an attack on the prevailing economic theory of his day, utilitarianism. This attack is powerful primarily because many of Dickens's characters take the theory seriously not only as a way to deal with abstract ethical issues but as a guide to everyday life. The "rationalism" of utilitarian reasoning is "understood not just as a way of writing up reports, but as a way of dealing with people in daily encounters . . . not just as a way of appearing professionally respectable, but as a commitment that determines the whole content of one's personal and social life."<sup>8</sup> *Hard Times* critiques utilitarianism not by investigating the theory at a level of abstraction but by looking at how people would actually act in the world if they took the theory to heart.

When we first meet Thomas Gradgrind, he is lecturing his class of schoolchildren. He desires that his students approach the world as he does, with reason rather than sentiment, and "with the detached theoretical and calculative power of the mathematical intellect, rather than the more qualitative type of reasoned deliberation."<sup>9</sup> Rather than call his pupils by name, he has assigned them numbers, and the class seems to be devoted to pedagogical exercises in rational "knowing." (For

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<sup>7</sup> F.R. LEAVIS, *THE GREAT TRADITION* 19 (1950). According to Leavis, "[he could] think of only one of [Dickens's] books in which his distinctive creative genius is controlled throughout to a unifying and organizing significance, and that is *Hard Times*, which seems because of its unusualness and comparatively small scale, to have escaped recognition for the great thing it is." *Id.*

<sup>8</sup> NUSSBAUM, *POETIC JUSTICE*, *supra* note 3, at 17.

<sup>9</sup> NUSSBAUM, *POETIC JUSTICE*, *supra* note 3, at 20.

example, when Gradgrind asks what a horse is, he wants only its scientific characteristics.) Deriding the imaginative faculties, or "fancy," he later explains that "[a student's] reason is . . . the only faculty to which education should be addressed."<sup>10</sup> Thus, when not inculcating his students in the capacity of reason, he works proofs "that the Good Samaritan was a Bad Economist."<sup>11</sup>

Even at home, Gradgrind seeks to act in the way that his theory would require. When his daughter Louisa learns that she has been the subject of a marriage proposal on the part of Josiah Bounderby, a boastful and wealthy manufacturer, she asks her father for advice. Gradgrind suggests that the issue of love is "misplaced" and advises that she "consider this question, as you have been accustomed to consider every other question, simply as one of tangible Fact."<sup>12</sup> He goes on to compare their respective ages—she is twenty, Bounderby is fifty. In considering whether the age difference should be a bar to their matrimony, he urges that "it is not unimportant to take into account the statistics of marriage." And "on reference to the figures," Gradgrind finds that an age differential is not so unusual. Knowledge of statistics of other people's marriages do little to help Louisa in her personal decision, however. In inner agony over the decision, she finally blurts out: "Father, I have often thought that life is very short." Gradgrind, baffled, replies:

"It is short, no doubt, my dear. Still, the average duration of human life is proved to have increased of late years. The calculations of various life assurance and annuity offices, among other figures which cannot go wrong, having established the fact."

"I speak of my own life, father."

"Oh, indeed? Still," said Mr. Gradgrind, "I need not point out to you Louisa, that it is governed by the laws of life in the aggregate."<sup>13</sup>

Even with his own family, Gradgrind is tied to his theory's commitment to the aggregation of pleasures and pains. His own daughter's anguish is left unrecognized as something distinct and important in and of itself.

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<sup>10</sup> DICKENS, *supra* note 1, at 25.

<sup>11</sup> DICKENS, *supra* note 1, at 215.

<sup>12</sup> DICKENS, *supra* note 1, at 101.

<sup>13</sup> DICKENS, *supra* note 1, at 103.

Dickens populates his novel with other characters who mirror Gradgrind's attachment to the rationalism of the day. The first of these is the aforementioned industrialist Bounderby, who represents the practical realization of Gradgrind's high-minded utilitarianism. As Leavis puts it, the two characters embody "two aspects of Victorian Utilitarianism," with Bounderby illustrating the pernicious "blindness" latent in Gradgrind's "theory."<sup>14</sup> Bounderby is the owner of the city's factory—a place that seems to summon up Blake's "Satanic Mills."<sup>15</sup> He sees his employees not as people but as producers. When one of the "Hands," Stephen Blackpool, asks his counsel about how to divorce a profligate wife, Bounderby explains that a divorce is possible only after an Act of Parliament, which would cost a fortune. Blackpool, dejected, mutters, "tis a muddle. 'Tis just a muddle a 'too-gether, an the sooner I am dead, the better."<sup>16</sup> Bounderby responds by warning Blackpool not to "talk nonsense . . . about things you don't understand; and don't you call the Institutions of your country a muddle, or you'll get yourself into a real muddle one of these fine mornings."<sup>17</sup> Bounderby then makes clear what he believes Blackpool's proper role to be: "The institutions of your country are not your piece-work, and the only thing you have got to do is mind your piece-work."<sup>18</sup>

If Bounderby represents the practical acting out of Gradgrind's theory, then the character of Bitzer becomes its monster. We first meet Bitzer in Gradgrind's classroom, where he pleases his instructor by stating precisely what a horse is: "Quadruped. Graminivorous. Forty teeth, namely twenty-four grinders, four eye-teeth, and twelve incisors. Sheds coat in the spring; in marshy countries, sheds hoofs, too. Hoofs hard, but requiring to be shod with iron. Age known by marks in mouth."<sup>19</sup> Bitzer's precocity reaches a grim fruition. He grows

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<sup>14</sup> LEAVIS, *supra* note 7, at 20.

<sup>15</sup> See WILLIAM BLAKE, *Preface to Milton*, in THE COMPLETE POETRY AND PROSE OF WILLIAM BLAKE 95 (David V. Erdman ed., 1988) ("And did the Countenance Divine, / Shine forth upon our clouded hills? / And was Jerusalem builded here, / Among these dark Satanic mills?").

<sup>16</sup> DICKENS, *supra* note 1, at 79.

<sup>17</sup> DICKENS, *supra* note 1, at 79-80.

<sup>18</sup> DICKENS, *supra* note 1, at 80.

<sup>19</sup> DICKENS, *supra* note 1, at 12.

into "an extremely clear-headed, cautious, prudent young man, who was safe to rise in the world. . . . His mind was so exactly regulated, that he had no affections or passions. All his proceedings were the result of the nicest and coldest calculation. . . ." <sup>20</sup> Indeed, Bitzer faults himself for his weakness in favoring his mother with half a pound of tea, insofar as "his only reasonable transaction in that commodity would have been to buy it for as little as he could possibly give, and sell it for as much as could possibly get."<sup>21</sup> Unlike Stephen Blackpool and the Good Samaritan, then, Bitzer is the paradigmatic "good economist."

The reader is repelled by Bounderby and Bitzer not because they are bad utilitarians but because they are very good ones. Dickens teaches that people who act as good utilitarians in their everyday lives are, as Nussbaum describes Bitzer, "chillingly weird and not quite human."<sup>22</sup>

A key question then, is what makes Gradgrind a compelling character for the reader, "a gripping and ultimately a deeply moving character," when Bitzer and Bounderby are not?<sup>23</sup> The answer is that Gradgrind undergoes an education: the events of the novel work to undermine Gradgrind's confidence in the rationalist method he had adopted in order to understand life. He watches as his son succumbs to gambling and drink and as his daughter is lost in an agonizing, empty marriage, in spite of their rationalist schooling. Gradgrind is also forced to reevaluate his notions of the Coketown "Hands," whom he had previously considered fungible commodities of finite and predictable appetites and capacities. As he meets individual Hands and attempts to make them conform to his larger algorithm, he is forced to concede that "he never could make out how it yielded this unaccountable product."<sup>24</sup> Gradgrind also is challenged by the presence of Sissy Jupe, a young girl who leaves a circus troupe and comes to live in the Gradgrind household. Gradgrind is forced to admit to himself that:

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<sup>20</sup> DICKENS, *supra* note 1, at 120.

<sup>21</sup> DICKENS, *supra*, note 1, at 120.

<sup>22</sup> NUSSBAUM, POETIC JUSTICE, *supra* note 3, at 30.

<sup>23</sup> NUSSBAUM, POETIC JUSTICE, *supra* note 3, at 30.

<sup>24</sup> DICKENS, *supra* note 1, at 55.



he had become possessed by an idea that there was something in this girl which could hardly be set forth in tabular form. Her capacity of definition might easily be stated at a very low figure, her mathematical knowledge at nothing; yet he was not sure that if it had been required, for example, to tick her off into columns in a parliamentary return, he would have known how to divide her.<sup>25</sup>

The climax of the novel arrives as Gradgrind, having been jarred from the comfort of his ultra-rationality, tries to help his son Tom escape from Coketown before he is discovered as a thief. Bitzer finds them, and Gradgrind pleads with Bitzer to have pity: "[H]ave you a heart?" Bitzer, well trained in Gradgrind's model school, makes the utilitarian reply:

"The circulation, sir," returned Bitzer, smiling at the oddity of the question, "couldn't be carried on without one. No man, sir, acquainted with the facts established by Harvey relating to the circulation of the blood can doubt that I have a heart."

"Is it accessible," cried Mr. Gradgrind, "to any compassionate influence?"

"It is accessible to Reason, sir," returned the excellent young man. "And to nothing else."<sup>26</sup>

Bitzer then explains why turning in Tom to the authorities is in Bitzer's own best interest—Bounderby will likely promote Bitzer to Tom's former position at the bank. And in defense of self interest, Bitzer explains,

I am sure you know that the whole social system is a question of self-interest. What you must always appeal to is a person's self-interest. . . . It's your only hold. We are so constituted. I was brought up in that catechism when I was very young, sir, as you are aware.<sup>27</sup>

When Gradgrind then asks Bitzer to allow Tom to escape out of gratitude for the education Bitzer has received, Bitzer again defers. The narrator explains:

It was a fundamental principle of the Gradgrind philosophy, that . . . [g]ratitude was to be abolished, and the virtues springing from it were not to be. Every inch of the existence of mankind, from birth to death, was to be a bargain across a counter. And if we didn't get to Heaven that way, it was not a politico-economical place, and

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<sup>25</sup> DICKENS, *supra*, note 1, at 95-96.

<sup>26</sup> DICKENS, *supra*, note 1, at 286.

<sup>27</sup> DICKENS, *supra*, note 1, at 287.

we had no business there.<sup>28</sup>

Gradgrind is thus faced squarely with the effects of the ethic he has espoused throughout the novel. His son is, in fact, eventually saved from Bitzer. But the saviors are Sissy Jupe's friends from the circus who hold Bitzer long enough to allow Tom to be spirited away. They represent the antithesis of the Gradgrind philosophy, because they dwell in a world of imagination rather than reason, community rather than self-interest.

Over the course of the novel, then, Gradgrind moves from a position of ultra-rationality, which is in fact ignorance and even irrationality, to one of comparatively greater understanding. (Bounderby and Bitzer, meanwhile, remain static, even stunted.) The irony is that Gradgrind's resting point finds him less certain of his reasoning faculties than his starting point. He is less certain, in other words, than Bounderby and Bitzer. As Gradgrind himself puts it, "Some persons hold . . . that there is a wisdom of the Head, and that there is a wisdom of the Heart. I have not supposed so; but, as I have said, I mistrust myself now. I have supposed the Head to be all-sufficient."<sup>29</sup>

### B. *The Irrationality of Utilitarianism*

Gradgrind's starting point—the point from which he is educated—is, of course, utilitarianism, and it is utilitarianism that is the target of much of Dickens's satire and scorn. As one critic has put it, "*Hard Times* is about an attitude of mind which we define . . . as utilitarianism, [and] the substance of the book is a testing of this 'philosophy.'"<sup>30</sup> To appreciate the manner in which *Hard Times* "tests" utilitarianism, a review of that philosophy's core tenets might be helpful.

Philosopher John Rawls has written that "[t]he main idea [of classical utilitarianism] is that society is rightly ordered, and therefore just, when its major institutions are arranged so as to achieve the greatest net balance of satisfaction summed

<sup>28</sup> DICKENS, *supra*, note 1, at 288.

<sup>29</sup> DICKENS, *supra* note 1, at 226.

<sup>30</sup> Glimour, *supra* note 2, at 211.

over all the individuals belonging to it."<sup>31</sup> Woven into this articulation of utilitarianism are two central, philosophical components: first, the idea that Rawls calls satisfaction (but what might also be termed happiness or pleasure) is the chief object of value; and second, that its maximization therefore represents the optimal arrangement of society.

The first component of utilitarianism, then, is its use of "happiness" as the unit of value. This is a practical, even descriptive, component to the extent that the utilitarian philosopher is attempting to characterize what people *do* value, rather than what they *should* value.<sup>32</sup> This is the so-called "greatest happiness principle," which characterizes the "ultimate end" as "an existence exempt as far as possible from pain, and as rich as possible in enjoyments, both in point of quantity and quality."<sup>33</sup> Its corollary is that "actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness."<sup>34</sup>

If this is so, if actions are right insofar as they promote happiness, then the necessary conclusion is that "[t]he multiplication of happiness is, according to the utilitarian ethics, the object of virtue."<sup>35</sup> Thus, the second component of utilitarianism, maximization, would appear to flow from the first. Maximization poses problems, however. As Rawls has noted, the utilitarian utopia is indifferent to whether the optimal amount of happiness is distributed evenly (or even roughly so) or whether one fortunate citizen is in possession of the sum total.<sup>36</sup> Dickens, though, was not indifferent.

Leavis saw in *Hard Times* a nuanced portrayal of "two aspects of Victorian Utilitarianism," encompassing both the

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<sup>31</sup> JOHN RAWLS, A THEORY OF JUSTICE 22 (1971).

<sup>32</sup> See JOHN STUART MILL, UTILITARIANISM 12 (Prometheus Books 1987) (1863) ("[M]en's sentiments, both of favor and of aversion, are greatly influenced by what they suppose to be the effects of things upon their happiness.").

<sup>33</sup> *Id.* at 22.

<sup>34</sup> *Id.* at 16.

<sup>35</sup> *Id.* at 30.

<sup>36</sup> RAWLS, *supra* note 31, at 26. In Rawls's words, [t]he striking feature of the utilitarian view of justice is that it does not matter, except indirectly, how this sum of satisfactions is distributed among individuals any more than it matters, except indirectly, how one man distributes his satisfactions over time. The correct distribution in either case is that which yields the maximum fulfillment.

RAWLS, *supra* note 31, at 26.

utilitarian ideal (Gradgrind the philosopher) and its degraded, real-world embodiment (Bounderby the factory owner).<sup>37</sup> And while the satire of utilitarianism in *Hard Times* has been dismissed by some as shallow,<sup>38</sup> at least one commentator argues that "Dickens's arguments possess more cogency than he is usually given credit for."<sup>39</sup> It may be that the core of Dickens's critique of utilitarianism is an attack on the arrogance of reducing value to a single currency, whether happiness, dollars, or otherwise. In one of the moments in which the author's indignation bursts out of the story, Dickens fairly rages: "[N]ot all the calculators of the National Debt can tell me the capacity for good or evil, for love or hatred, for patriotism or discontent, for the decomposition of virtue into vice, or the reverse, at any single moment in the soul."<sup>40</sup> In this passage Dickens lays his agenda bare. People are not fungible; they are not merely the indistinguishable "component drops" in the ocean of humanity.<sup>41</sup> Their value cannot be reduced to arithmetic. We must "govern these awful unknown quantities by other means!"<sup>42</sup>

Dickens makes a similar point through the character of Sissy Jupe, Bitzer's counterpoint in Gradgrind's classroom. Like Rawls, Sissy perceives the injustice inherent in sacrificing individual happiness for some sort of aggregate happiness. Confronted with the mathematically optimal "proportion" of twenty-five deaths by starvation per million city dwellers, Sissy notes "that I thought it must be just as hard upon those who were starved, whether the others were a million, or a million million."<sup>43</sup> Nussbaum also picks up on this aspect of Dickens's critique when she remarks on utilitarianism's blind-

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<sup>37</sup> LEAVIS, *supra* note 7, at 20.

<sup>38</sup> See Marjorie Stone, *Dickens, Bentham, and the Fiction of the Law: A Victorian Controversy and Its Consequences*, 29 VICTORIAN STUD. 125 (1985).

<sup>39</sup> Richard J. Arneson, *Benthamite Utilitarianism and Hard Times*, 2 PHIL. & LITERATURE 60, 60 (1978). Moreover, if *Hard Times* is melodramatic, so too were the political repercussions of the Benthamites, which Richard Posner has inventoried: "the defense of torture, the admiration for the Court of the Star Chamber, the proposal to imprison beggars, the belief in surveillance and indoctrination, the depreciation of rights." RICHARD POSNER, *The First Neoconservative*, in OVERCOMING LAW 270 (1995) [hereinafter POSNER, *The First Neoconservative*].

<sup>40</sup> DICKENS, *supra* note 1, at 74.

<sup>41</sup> DICKENS, *supra* note 1, at 161.

<sup>42</sup> DICKENS, *supra* note 1, at 74.

<sup>43</sup> DICKENS, *supra* note 1, at 62.

ness toward "the separateness of . . . people, to their inner depths, their hopes and loves and fears."<sup>44</sup>

This critique of the commensurability of value and the feasibility of situating value in the aggregate reaches another component of utilitarianism—the assertion that people are rational maximizers. This notion was perhaps only implicit in the writings of its early exponents but was the explicit object of Dickens's literary ire. Inherent in utilitarianism is the belief that, given the unit of value (whether happiness, satisfaction, "utils" or otherwise), people will act in such a way as to secure the maximum amount. As Rawls puts it, "[t]he most natural way . . . of arriving at utilitarianism . . . is to adopt for society as a whole the principle of rational choice for one man."<sup>45</sup>

Dickens indicts this assumption through the character of Stephen Blackpool. As one critic has pointed out: "[Blackpool] eschews calculation, whereas it is the hallmark of the Utilitarian to be willing to calculate the consequences of all feasible actions, even the most nefarious, and to choose always that act which is expected to produce the most good in the long run."<sup>46</sup> Blackpool himself voices what amounts to a similar critique of utilitarianism's tendency to reduce every individual to what she can produce, "ratin' 'em as so much Power, and reg'latin 'em as if they was figures in a soom, or machines: wi'out loves and likeins, wi'out memories and inclinations, wi'out souls to weary and souls to hope."<sup>47</sup> This is the statement for which Blackpool loses his job.

These characters, the Stephen Blackpools and Sissy Jupes who refuse to reduce the world to a set of commensurable values or to make decisions based on blind aggregation of such values, strike the reader as genuine. They are the people who most remind us of those whom the reader admires and wants to emulate. But they are not merely good; they are also rational. The mathematical balancing that is typical of Gradgrind's utilitarian rationality does not seem rational at all but rather childish and obtuse when applied in the "real" world of the novel. The "education" that takes place in the model classroom

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<sup>44</sup> NUSSBAUM, *POETIC JUSTICE*, *supra* note 3, at 26-27.

<sup>45</sup> RAWLS, *supra* note 31, at 26-27.

<sup>46</sup> Arneson, *supra* note 39, at 68.

<sup>47</sup> DICKENS, *supra* note 1, at 154-55.

is impoverished, incomplete, wrong-headed, and, when applied elsewhere, unjust. The people who apply the model classroom's notions appear childish or irrational or inhuman.

In sum, then, Dickens uses *Hard Times* to show that, far from being an exercise in rationality, utilitarian decisionmaking is profoundly irrational. Its ruthless algebra is ultimately deficient, both in insisting that value is commensurable and in seeking solely to maximize its aggregate. Confronted with the "unaccountable product" of the myriad variations of human desire and sense of the good, utilitarianism fudges the numbers and tells itself that everything is not so complicated after all.<sup>48</sup> But by the novel's end, Gradgrind has learned better. It is the premise of this Article that his education has implications above and beyond a critique of Victorian utilitarianism.

### C. *The Aristotelian Underpinnings of Dickens's Critique*

Before we apply Dickens's critique more specifically to corporate law, it is worth noting that *Hard Times's* criticism of utilitarianism can be situated within the Aristotelian tradition. In her essay "The Discernment of Perception: An Aristotelian Conception of Private and Public Rationality,"<sup>49</sup> Martha Nussbaum launches an Aristotelian critique of scientific rationality as a method of decisionmaking, a critique that in many ways mirrors and extrapolates upon Dickens's critique of utilitarianism. Like *Hard Times's* attack on utilitarianism, Nussbaum's critique focuses upon two crucial premises: "commensurability," the idea that all things may be valued on a single scale, whether dollars, utils or otherwise; and "metricity," the idea that a single algorithm can then provide an adequate basis for sound decisionmaking.<sup>50</sup>

According to Nussbaum, Aristotle was well aware of arguments based on "commensurability," or the notion "that a hallmark of rational choice is the measurement of all alternatives by a single quantitative standard of value."<sup>51</sup> Aristotle reject-

<sup>48</sup> DICKENS, *supra* note 1, at 55.

<sup>49</sup> MARTHA NUSSBAUM, *The Discernment of Perception: An Aristotelian Conception of Private and Public Rationality*, in LOVE'S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE 54 (1990) [hereinafter NUSSBAUM, *Discernment of Perception*].

<sup>50</sup> NUSSBAUM, *Discernment of Perception*, *supra* note 49, at 55.

<sup>51</sup> NUSSBAUM, *Discernment of Perception*, *supra* note 49, at 56.

ed the idea that we value each object of desire in the same way, distinguishing between that which we derive from, say, honor, wisdom, and pleasure. Nussbaum concludes:

What [Aristotle] seems to be saying is that what we pursue or choose when we deem each of these items choiceworthy is something distinct, peculiar to the item in question; there is no single thing that belongs to all of them in such a way as to offer a plausible unitary account of their practical value.<sup>52</sup>

Implicit in this rejection of commensurability is a repudiation of commensurability's corollary, fungibility. If honor and wisdom inhabit separate scales, then they cannot be balanced against one another, or exchanged for one another.

According to Nussbaum, the second portion of Aristotle's critique focuses on metricity. Metricity might be defined as a reliance upon antecedently fixed rules, or "metrics," for the solution of all dilemmas. A central problem with metricity is that it is clumsy. Just as a straight ruler cannot measure the supple contours of a fluted column, so too antecedently fixed principles falter in addressing the myriad variations of experience. Good deliberation, Nussbaum tells us, is more like "theatrical or musical improvisation, where what counts is flexibility, responsiveness, and openness to the external . . . to rely on an algorithm here is not only insufficient, it is a sign of immaturity and weakness."<sup>53</sup> Fixed rules based on a single metric may actually be "a falling off from full practical rationality, not its flourishing or completion."<sup>54</sup> They often and willfully oversimplify the complexities that decisionmakers must address.

Dickens and Aristotle thus agree that utilitarianism is, in an important sense, irrational. As we learn from *Hard Times*, individuals who actually try to take the lessons of utilitarianism to heart seem childish, obtuse, or insane. As we argue in the next Part, this is how corporate law requires management to act.

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<sup>52</sup> NUSSBAUM, *Discernment of Perception*, *supra* note 49, at 58.

<sup>53</sup> NUSSBAUM, *Discernment of Perception*, *supra* note 49, at 74.

<sup>54</sup> NUSSBAUM, *Discernment of Perception*, *supra* note 49, at 73.

## II. *HARD TIMES* AND CORPORATE LAW

The particular implications of utilitarianism that interest us have to do with that philosophy's theoretical progeny. As one commentator has noted, the contours of Dickens's critique extend beyond utilitarianism to encompass "the classical political economists's model of human psychology."<sup>55</sup> Early on, Karl Marx realized that utilitarianism "only became fraught with meaning when economic relations, especially division of labour and exchange, were included."<sup>56</sup> In the Victorian era of euphemism, utilitarian cant about a "happiness principle" was well and good, but the philosophy was really and finally about economics.<sup>57</sup> Moreover, as Richard Posner has noted, utilitarianism was and is about, or lends itself to, a particular sort of economics—"the kind of laissez-faire approach associated with economic libertarians" such as Milton Friedman.<sup>58</sup>

Perhaps the closest living relative of the utilitarianism that Dickens critiques in *Hard Times* is the corporate law of the United States. Corporate law at the end of the twentieth century is characterized by those principles that served as targets for Dickens in the middle of the nineteenth century. According to the majority rule, members of corporate management are to be constrained in their decisionmaking to a single, over-arching goal: the maximization of shareholder wealth. It is Friedman, a Nobel-Prize winning economist, who has famously explained the director's fiduciary duty to increase shareholder profits: "In a free-enterprise, private-property system a corporate executive is an employee of the owners of the business. He has direct responsibility to his employers. That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible . . . ."<sup>59</sup>

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<sup>55</sup> Arneson, *supra* note 39, at 64.

<sup>56</sup> KARL MARX, 5 COLLECTED WORKS 414 (Lawrence & Wishhart 1976).

<sup>57</sup> T.W. Hutchinson, *Bentham as an Economist*, 66 ECON. J. 288, 290 (1956) ("Bentham's development of, and emphasis on, the two concepts of maximization and utility make him above all the ancestor of neo-classical economic theorising.").

<sup>58</sup> POSNER, *The First Neoconservative*, *supra* note 39, at 263.

<sup>59</sup> Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAGAZINE, Sept. 13, 1970, at 32-33, 122, 124, 126. Over a century earlier, Herman Melville provided a dramatization of this principle in *Moby-Dick*. When that novel's narrator, Ishmael, joins the Pequod's crew for its



The seminal decision in developing and explicating the fiduciary duty to maximize shareholder profits was handed down in 1919 by the Michigan Supreme Court in *Dodge v. Ford Motor Co.*<sup>60</sup> That case involved a suit on the part of minority shareholders against Henry Ford challenging Ford's new policy against declaring special dividends.<sup>61</sup> In particular, the plaintiffs pointed to the fact that, even prior to the new policy, the company's profits had risen much faster than the dividends.<sup>62</sup> In the press, Ford had been defiant, proclaiming his decision to reinvest in the company "[in order] to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes."<sup>63</sup> The Michigan Supreme Court frowned upon Ford's philanthropic impulses, declaring:

*A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the non-distribution of profits among stockholders in order to devote them to other purposes.*<sup>64</sup>

Accordingly, Ford was ordered to pay the dividends.<sup>65</sup>

This fiduciary duty on the part of directors to maximize shareholder profits has become the dominant rule in Delaware,

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infamous voyage, he is assigned a "lay," i.e., a share of the voyage's profits. In figuring Ishmael's lay, one of the ship's "directors" (Captain Bildad) proposes an apparently modest share, but the other (Captain Peleg) objects. Bildad reminds Peleg that "thou must consider the duty thou owest to the owners of this ship—widows and orphans, many of them—and that if we too abundantly reward the labors of this young man, we may be taking the bread from those widows and those orphans." HERMAN MELVILLE, *MOBY-DICK OR, THE WHALE* 90-91 (Signet Classic ed., 1980) (1851).

<sup>60</sup> 170 N.W. 668 (Mich. 1919).

<sup>61</sup> See *id.* at 671.

<sup>62</sup> See *id.* at 672-73.

<sup>63</sup> *Id.* at 671. It can be argued that Ford, in a rather quixotic way, anticipated the so-called "social responsibility" critique of the fiduciary duty to maximize profits. See, e.g., CHRISTOPHER D. STONE, *WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR* 80 (1975) ("[Those arguing against corporate social responsibility] assume[ ] . . . that the managers of the corporation are to be steered almost wholly by profit, rather than by what they think proper for society on the whole. Why should this be so?").

<sup>64</sup> *Dodge*, 170 N.W. at 684.

<sup>65</sup> See *id.* at 685.

the key jurisdiction for American corporate law. In 1985, the Supreme Court of Delaware stated that "[i]n carrying out their managerial roles, directors are charged with an *unyielding* fiduciary duty to the corporation and its shareholders."<sup>68</sup> In 1986, Chancellor William T. Allen emphasized the same point: "It is the obligation of directors to attempt, within the law, to maximize the long-run interests of the corporation's stockholders; that they may sometimes do so 'at the expense' of others . . . does not for that reason constitute a breach of duty."<sup>67</sup>

Some have argued that Dickens's critique of utilitarianism was insufficiently nuanced.<sup>68</sup> For example, as Nussbaum pointed out, Bentham believed that each person should count as one and "none more than one."<sup>69</sup> The portrayal of industrialists who care not at all about the desires, pleasures, and pains of their employees thus could be critiqued on classical utilitarian grounds. But as Nussbaum contends, Dickens's attack is nevertheless very meaningful.<sup>70</sup> A utilitarian economist could very consistently develop a model of human choice that would set as the standard the maximization of personal preferences and imbue this model with a normative dimension.<sup>71</sup> What's more, the theory that Dickens critiqued, even in its simple form, certainly wields real influence within current legal and political debate.<sup>72</sup>

Corporate law is thus one of those realms where the kind of utilitarianism that Dickens critiques still holds sway. Wealth maximization is the normative goal. But it is not just wealth maximization in general or societal terms that is the touchstone of corporate law: it is the wealth maximization of shareholders only. All choices must be analyzed as to that one value. All other "goods" are to be taken into account only if

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<sup>68</sup> *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985) (emphasis added); see also *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 176 (Del. 1986) (concluding that concern for "various constituencies" may be taken into consideration by directors only if there are "rationally related benefits accruing to the stockholders").

<sup>67</sup> *Katz v. Oak Indus. Inc.*, 508 A.2d 873, 879 (Del. Ch. 1986) (citation omitted).

<sup>68</sup> See *supra* note 38 and accompanying text.

<sup>69</sup> NUSSBAUM, *POETIC JUSTICE*, *supra* note 3, at 33.

<sup>70</sup> NUSSBAUM, *POETIC JUSTICE*, *supra* note 3, at 16.

<sup>71</sup> NUSSBAUM, *POETIC JUSTICE*, *supra* note 3, at 16.

<sup>72</sup> NUSSBAUM, *POETIC JUSTICE*, *supra* note 3, at 18.

they are commensurable with that one measure. Choices are well made when they serve that goal and poorly made when they do not. Dickens's critique—that utilitarianism is irrational insofar as it requires a dependence on commensurability and maximization—must be taken seriously when applied to corporate law. If utilitarianism is irrational when applied in the real world, then existing corporate law doctrine requires corporate managers to make decisions in an impoverished way. Law is commanding irrationality.

### III. THE PUZZLE OF THE BUSINESS JUDGEMENT RULE

One of the great puzzles of corporate law is the co-existence of the strict duty to maximize shareholder profits with the business judgment rule, a rule of judicial deference to the decisions of corporate management. This Part explores and offers a new explanation for the apparent paradox between the two legal norms.

#### A. *The Puzzle in Action*

The business judgment rule includes at least two legal principles. As a presumption, the rule provides that the acts of independent directors will be presumed to be taken in good faith and with appropriate care. As a substantive rule of law, the business judgment rule provides that the directors will incur no liability for an injury or loss to the corporation arising from corporate action when they, in authorizing such action, proceeded in good faith and with appropriate care.<sup>73</sup>

The presumptive aspect of the BJR has often been elevated over—or trumpeted to the exclusion of—the substantive one. In *Aronson v. Lewis*, for example, the Delaware Supreme

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<sup>73</sup> 1 ERNEST L. FOLK III ET AL., FOLK ON THE DELAWARE GENERAL CORPORATION LAW § 141.2.2.2 (3d. ed. 1996); see also Charles Hansen, *The Duty of Care, the Business Judgment Rule, and the American Law Institute Corporate Governance Project*, 48 BUS. LAW. 1355, 1369 (1993) ("As a matter of substantive law, the business judgment rule protects a director from duty of care liability to the corporation and its shareholders for a decision (and also protects the decision itself) if the director has acted with due care and in good faith; and as a matter of procedure, is a presumption that the director has so acted." (quoting DENNIS J. BLOCK, THE BUSINESS JUDGMENT RULE 8-12 (3d ed. 1991))).

Court defined the business judgment rule entirely in terms of a presumption: "[The business judgment rule] is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."<sup>74</sup> Thus, according to the *Aronson* court, the BJR inheres wholly in a series of changes of evidentiary burdens. Absent an abuse of discretion, management's judgment will be respected by the courts. The burden is on the party challenging the decision to establish facts rebutting the presumption.<sup>75</sup>

A number of commentators have insisted that the presumptive or procedural aspects of the business judgment rule are secondary to the substantive rule, which is "the core of the business judgment rule."<sup>76</sup> They argue that it is misleading to define the rule in terms of the presumption that it engenders.<sup>77</sup> Instead, they articulate a simpler and less technical version of the business judgment rule. As Samuel Arsht puts it,

[T]he term "business judgment rule" and the presumption that often identifies it mean simply that a stockholder who challenges a nonself-dealing transaction must persuade the court that the corporation's directors, officers, or controlling stockholders in authorizing the transaction did not act in good faith, did not act in a manner they reasonably believed to be in the corporation's best interest, or did not exercise the care an ordinarily prudent person in a like position would use under similar circumstances.<sup>78</sup>

The key point for our purposes is that the practical effect of the business judgment rule is that directors are accorded remarkably wide latitude in the conduct of their corporation's business, with courts resisting the impulse to interfere absent some suggestion of self-dealing, conflict of interest, or illegality.<sup>79</sup> Herein lies the apparent paradox. Even with the gener-

<sup>74</sup> *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (citations omitted).

<sup>75</sup> See *id.*

<sup>76</sup> R. Franklin Balotti & James J. Hanks, Jr., *Rejudging the Business Judgment Rule*, 48 BUS. LAW. 1337, 1339 (1993).

<sup>77</sup> See S. Samuel Arsht, *The Business Judgement Rule Revisited*, 8 HOFSTRA L. REV. 93, 94 (1979) ("Subsuming the presumptions and limitations under the term 'business judgement rule' leads to confusion because the single term is then employed with reference to wholly different aspects of the rule's application, which are governed by disparate legal principles.").

<sup>78</sup> *Id.* at 134.

<sup>79</sup> See WILLIAM A. KLEIN & JOHN C. COFFEE, JR., BUSINESS ORGANIZATION AND

ous latitude in terms of method, there is no doubt that, in strict legal terms, the directors' fiduciary duty is still to maximize shareholder profits. As John Coffee and William Klein have stated, "directors have great discretion over how to maximize the return to shareholders, but not whether to."<sup>80</sup> But, of course, latitude as to method gives management what is, in effect, latitude as to ultimate goal. If courts are to take seriously the duty of management to maximize the value of the firm to shareholders, they should not apply a rule of deference to the decisions of corporate management. Frank Easterbrook and Daniel Fischel have also noticed the apparent incongruity: "The fiduciary principle suggests that courts should routinely conduct wide-ranging inquiries to determine the bargain that managers and investors would have reached if transactions costs were zero . . . . Yet judges invoke the 'business judgment rule,' a doctrine absolving managers of liability even though their conduct is negligent."<sup>81</sup>

When applied in actual cases, one can easily recognize the tension between the strictness of the underlying duty and the deference said to arise from the business judgment rule. Take for example the situations in which directors are confronted with a prospective merger, a take-over, or a choice between the two. It may be that the tension between the business judgment rule and the fiduciary duty is at its greatest in such cases. What is business judgment in such a situation, other than the simple arithmetic of calculating the most advantageous price? And if, even in these scenarios, business judgment entails something more than gaining the highest price for shareholders, where does that leave the fiduciary duty to maximize profits as a corporate compass? These questions were confronted in a critical series of Delaware cases stretching from the 1980s to the early 1990s.

Consider in this context *Unocal Corp. v. Mesa Petroleum Co.*,<sup>82</sup> in which the Delaware Supreme Court confronted the issue of whether the Unocal board's actions in opposing a take-over attempt by Mesa were entitled to the protection of the

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FINANCE: LEGAL AND ECONOMIC PRINCIPLES 127 (5th ed. 1993).

<sup>80</sup> *Id.*

<sup>81</sup> FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 93 (1991).

<sup>82</sup> 493 A.2d 946 (Del. 1985).

business judgment rule.<sup>83</sup> The court's analysis began with the "basic principle" that "directors have a fiduciary duty to act in the best interests of the corporation's stockholders."<sup>84</sup> Nonetheless, the court noted that the business judgment rule was applicable even in takeover situations.<sup>85</sup> The court seemingly weakened the emphasis on shareholder supremacy when it noted that the director's power to erect defenses to takeovers derived from the board's "fundamental duty and obligation to protect the corporate enterprise, which includes stockholders' . . . ."<sup>86</sup> To satisfy the standards of the BJR, it was incumbent upon the directors in the face of an inherent conflict of interest, to "show that they had reasonable grounds for believing that a danger to corporate policy and effectiveness existed."<sup>87</sup> The court seemed to eschew mathematical calculation. This burden could be met, it said, "by showing good faith and reasonable investigation" on the part of the board in evaluating the prospective tender.<sup>88</sup>

In recognizing the tension between the underlying duty and the BJR, it is also significant that the court required the board to consider the "element of balance,"<sup>89</sup> that is, that the defensive measure adopted "must be reasonable in relation to the threat posed."<sup>90</sup> And in considering the seriousness of the threat to the corporate enterprise, the board could reasonably consider a wide range of possible effects of the takeover. Included in this list were a number of things that did not relate directly to shareholder wealth, including "questions of illegality [and] the impact on 'constituencies' other than the shareholders (i.e., creditors, customers, employees, and perhaps even the community generally)."<sup>91</sup> With this analytical framework in

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<sup>83</sup> *Id.* at 953. The Unocal board had decided to issue a tender offer for the company's own shares in response to a "front loaded" tender offer by Mesa. Furthermore, Unocal's self-tender excluded Mesa from participating, after concluding that to do otherwise would be to finance Mesa's facially inadequate proposal. Mesa challenged the exclusion in court. *See id.* at 949-52.

<sup>84</sup> *Id.* at 955 (citation omitted).

<sup>85</sup> *See id.* at 954.

<sup>86</sup> *Id.* at 954 (emphasis added).

<sup>87</sup> *Unocal*, 493 A.2d at 954, 955.

<sup>88</sup> *Id.* at 955.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

place, the *Unocal* court concluded that the "front loaded" nature of Mesa's tender, as well as Mesa's reputation as a "greenmailer," justified the board's defensive measures and thus entitled them to the protections of the business judgment rule.<sup>92</sup>

The difficulty of reconciling the fiduciary duty with the BJR is also illustrated by *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*<sup>93</sup> and its apparent inconsistencies with *Unocal*. In *Revlon*, the Supreme Court of Delaware confronted the issue of the validity of lock-ups and related defensive agreements in the face of an active bidding contest for corporate control.<sup>94</sup> Although the case was decided only a few months after *Unocal*, the *Revlon* court's emphasis was very different. It diminished the importance of the deference represented by the BJR: "[w]hile the business judgment rule may be applicable to the actions of corporate directors responding to takeover threats, the principles upon which it is founded—care, loyalty and independence—must *first* be established."<sup>95</sup> In this case, the defenses were deemed inappropriate because "the breakup of the company was inevitable." The situation had become one of an auction, and:

The duty of the board had . . . changed from the preservation of Revlon as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit . . . . The directors' role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of

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<sup>92</sup> See, *Unocal*, 493 A.2d at 956-57.

<sup>93</sup> 506 A.2d 173 (Del. 1986). The take-over scenario in *Revlon* came into being when Pantry Pride initiated talks with Revlon concerning a friendly acquisition. See *id.* at 176. After an initial offer of between \$40 and \$50 per share, Revlon's chairman cut off talks, and all subsequent offers were rebuffed. See *id.* Concerned about a hostile takeover by Pantry Pride, Revlon's board adopted a "Rights" plan and also repurchased roughly 16.5% of its outstanding 30 million shares. See *id.* at 177. In response to Pantry Pride's first hostile tender offer, the Revlon board made its own offer for up to 10 million shares. See *id.* at 177. After Pantry Pride escalated its bids, ultimately offering \$56.25 per share, Revlon found its "white knight" in Forstmann, Little & Co., whose less-than-chivalrous final offer was conditioned upon a "lock-up" option to purchase two of Revlon's subsidiaries at a price below that of their estimated market value. See *id.* at 178. Furthermore, the "Rights" covenants were to be excised, and Revlon was to be subject to a no-shop provision. See *id.* Ultimately, Pantry Pride raised its offer to \$58 per share. See *id.* at 179.

<sup>94</sup> *Id.* at 176.

<sup>95</sup> *Id.* at 180 (emphasis added) (citation omitted).

the company.<sup>96</sup>

The court emphasized that it was the interests of the shareholders that are paramount in such a situation. The concern for other constituencies, apparently endorsed by *Unocal*, was seen as "inappropriate" when the auction was in progress, because the object of such an auction is to sell the company "to the highest bidder."<sup>97</sup> The court even went further, seemingly explaining away *Unocal*'s discussion of the permissibility of looking to the concerns of other constituencies. Discussing *Unocal*'s treatment of that issue, the *Revlon* court said that the "board may have regard for various constituencies in discharging its responsibilities, *provided there are rationally related benefits accruing to the stockholders.*"<sup>98</sup> Because this sentence did not relate to the auction situation at hand in *Revlon*, it appears to interpret the consideration of other constituencies in the non-auction situation like that at issue in *Revlon* itself. The test, according to the *Revlon* court, even in the face of the deference inherent in the BJR, is whether the directors's consideration of other constituencies "rationally relate[s]" to the interests of the shareholders. But, of course, if that is the test, *Unocal*'s language does not add anything meaningful over and above the strict fiduciary duty to maximize shareholder value.<sup>99</sup>

If *Revlon* appeared to herald a decisive victory of the fiduciary duty to maximize shareholder profits over the business judgment rule, that victory was subsequently put into doubt in *Paramount Communications, Inc. v. Time, Inc.*<sup>100</sup> In that case, the Delaware Supreme Court abjured the notion that every prospective merger triggers a "*Revlon* duty" obliging directors to become auctioneers. And so, Time, contemplating a merger in which it would nominally be the object, was not necessarily obliged to sell the company to the highest bidder. Moreover, Time could adopt defensive mechanisms to prevent just such an auction from occurring.<sup>101</sup>

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<sup>96</sup> *Id.* at 182.

<sup>97</sup> *Id.* at 182.

<sup>98</sup> *Revlon*, 506 A.2d at 182 (emphasis added).

<sup>99</sup> The court emphasized this point again later in the opinion, saying that the initial defenses put in place by the *Revlon* board before the auction began were appropriate because they "worked to the benefit of the shareholders." *Id.* at 185.

<sup>100</sup> 571 A.2d 1140 (Del. 1989).

<sup>101</sup> In the 1980s, Time sought to join with a company that produced vid-



The Supreme Court of Delaware distinguished Time's predicament from the "auction" at issue in *Revlon*.<sup>102</sup> As the *Time* court noted, "The adoption of structural safety devices alone does not trigger *Revlon*. Rather, . . . such devices are properly subject to a *Unocal* analysis."<sup>103</sup> Applying the *Unocal* analysis, the court rejected the plaintiffs' contention that an all-cash offer of adequate value could pose no "threat" justifying defensive measures, and that, consequently, the board's business judgment was a simple matter of calculating the higher offer. Indeed, the court took note of Time's desire to maintain a certain corporate culture and concluded that the board of directors was not "under any per se duty to maximize shareholder value in the short term, even in the context of a takeover."<sup>104</sup> Thus, even in takeover cases, corporate decisionmaking involves more than "simple mathematical exercise."<sup>105</sup> With Time's board having reached the relative sanctuary of the business judgment rule, the *Time* court concluded that the rule's precepts "militate against a court's engaging in the process of attempting to appraise and evaluate the relative merits of a long-term versus a short-term investment goal for shareholders."<sup>106</sup>

The latest chapter in this series of takeover cases decided

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eo/entertainment products that would complement Time's video and cable operations. *See id.* at 1143-44. Time's partner of choice was Warner. *See id.* at 1144. Nonetheless, Time's board was wary of entering the merger market, out of concerns that the company would be placed "in play" and its journalistic integrity, or unique corporate culture, thereby jeopardized. *See id.* As a result, Time's board favored a cash acquisition, rather than a less debt-ridden stock-swap. *See id.* at 1145. Time's board ultimately approved a deal under which Warner stock would be purchased at a premium, such that Warner shareholders would end up owning approximately 62% of Time-Warner, and which ultimately included a "no-shop" or "lock-up" agreement prohibiting Time from considering other proposals. *See id.* at 1146-47. Soon after, however, Paramount made an all-cash tender offer for outstanding shares of Time of \$175 per share, almost \$50 over the stock's trading price, an offer which Time subsequently rejected even as it escalated to \$200 per share. *See id.* at 1147-49.

<sup>102</sup> *Id.* at 1150-51 ("If . . . the board's reaction to a hostile tender offer is found to constitute only a defensive response and not an abandonment of the corporation's continued existence, *Revlon* duties are not triggered, though *Unocal* duties attach.").

<sup>103</sup> *Id.* at 1151.

<sup>104</sup> *Time*, 571 A.2d at 1150; *see also id.* at 1154.

<sup>105</sup> *Id.* at 1153.

<sup>106</sup> *Id.* at 1153.

by the Supreme Court of Delaware is *Paramount Communications Inc. v. QVC Network Inc.*<sup>107</sup> This case involved Time's jilted suitor, Paramount, which had subsequently sought a merger with Viacom and then adopted defensive measures to ward off the tender offer of another company, QVC.<sup>108</sup> The Supreme Court of Delaware began its decision on an ominous note for the business judgment rule, declaring that takeovers, mergers, and acquisitions constitute "rare situations which mandate that a court take a more direct and active role in overseeing the decisions made and actions taken by directors."<sup>109</sup> This heightened scrutiny means that *Revlon* duties are in play not only when the corporate entity is subject to "break-up" but also when a change of control is imminent.<sup>110</sup> In the sale or change of control scenario that confronted Paramount, for instance, the Paramount directors were under "an obligation to take the maximum advantage of the current opportunity to realize for the stockholders the best value reasonably available."<sup>111</sup>

That said, however, the *Paramount* court appeared to recoil from a commitment to the business judgment of pure calculation that it had just implied, admitting that "[t]here are many business and financial considerations implicated in investigating and selecting the best value reasonably available."<sup>112</sup> Thus, even in a so-called *Revlon* situation, where the director is ostensibly reduced to an auctioneer, courts must remain cognizant of the fact that "[t]he board of directors is the

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<sup>107</sup> 637 A.2d 34 (Del. 1993).

<sup>108</sup> Paramount, whose board, still searching for a vertically integrated marriage of entertainment production and distribution, sought out Viacom in 1990. *See id.* at 38. Ultimately, the two companies agreed that Viacom would purchase Paramount with a package of cash and stock worth \$61 per share. Paramount's board approved the merger, which included a "no-shop" provision, a termination fee provision, and a stock option provision entitling Viacom to purchase 19.9% of Paramount's outstanding common stock at \$69.14 per share should Paramount fail to complete the transaction. *See id.* at 38-39. This latter provision had some unusual provisions that made it potentially exorbitant for Paramount to back out of the merger. *See id.* at 39. Subsequently, QVC made an all-cash tender offer of \$80 per share. Despite QVC's more attractive measure, Paramount's board essentially adhered to the merger agreement with Viacom, including its elaborate defense provisions. *See id.* at 39-41.

<sup>109</sup> *Id.* at 42.

<sup>110</sup> *Id.* at 46-48.

<sup>111</sup> *Id.* at 43.

<sup>112</sup> *Paramount*, 637 A.2d at 45.

corporate decisionmaking body best equipped to make these judgments."<sup>113</sup> The appropriate inquiry, then, is whether "the directors made a *reasonable* decision, not a *perfect* decision."<sup>114</sup> In short, even in such an apparently formulaic project as determining the best value for a company, "courts will not substitute their business judgment for that of the directors, but will determine if the directors' decision was, on balance, within a range of reasonableness."<sup>115</sup> Even so, however, the court concluded that the "significant [\$1 billion] disparity of value" between the QVC and Viacom offers, as well as the uninformed manner in which the board's decision had been made, undermined any contention on its part that its decision was strategic or even reasonable.<sup>116</sup>

These takeover cases highlight the abiding paradox represented by the coexistence of the fiduciary duty to maximize profits and the business judgment rule. Even in such a seemingly numbers-oriented alembic as a takeover bid, the courts appear to be unwilling to reduce business judgment to a matter of achieving the highest profits for the shareholders. Indeed, *Unocal* and *Time* demonstrate that the use of defensive mechanisms that would appear to work against shareholder profits are paradigmatic instances of the validity of business judgment based on less profit-driven considerations, such as corporate culture (in the case of *Time*) or other constituencies (in the case of *Unocal*).

And as for auctions and bidding wars, their lesson may be that value itself is no simple matter. As the court in *Paramount* suggested, value can be chimerical, and the business judgment rule, to an extent, accommodates its just appraisal. Yet the takeover cases also demonstrate that the business judgment rule hardly emancipates directors from their fiduciary duty to maximize shareholder profits. On the contrary, the takeover cases impose more difficulties for the directors in exercising their judgment, more points at which they must tie their decisions, however remotely, to the goal of enriching shareholders.

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 50.

Finally, the takeover cases return us to the question of the impetus behind the business judgment rule. If nothing else, the Delaware Supreme Court displays a marked ability to address business decisions in a very detailed way. This ability undermines the notion, often seen as supporting the BJR, that courts are incapable of such analysis. On the other hand, the Delaware court's willingness to impose added thresholds in the exercise of business judgment would seem to draw into question the argument sometimes made by law and economics scholars that the business judgment rule shields economic decisions from non-economic decisionmakers (i.e., courts).<sup>117</sup> These explanations for the BJR are the focus of the next section.

### B. *The Dominant Explanations for the Business Judgment Rule*

The difficulties inherent in balancing the strict underlying duty to maximize profits with the deference to managers inherent in the business judgment rule have been the subject of much scholarly inquiry. To date, two principal theories have competed to explain and justify the BJR and to resolve the apparent dilemma between the rule and the duty to maximize shareholder returns.<sup>118</sup> The first theory asserts that the BJR keeps courts out of boardrooms where they have little expertise. One might refer to this as the "traditional" rationale. The traditional rationale behind the BJR is based on the assumption or assertion that judges generally are not competent to assess the conduct and decisions of professional business people. Thus, the rule "reliev[es] the courts from the duty to do what courts profess to be incompetent to do."<sup>119</sup> Even the *Dodge* court appeared sympathetic to this rationale, conceding that "judges are not business experts."<sup>120</sup>

This rationale, however, seems more than a little disingen-

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<sup>117</sup> See *infra* note 124 and accompanying text.

<sup>118</sup> See Bartley A. Brennan, *Current Developments Surrounding the Business Judgment Rule: A "Race to the Bottom" Theory of Corporate Law Revived*, 12 WHITTIER L. REV. 299, 302 (1991).

<sup>119</sup> Robert N. Leavall, *Corporate Social-Reform, the Business-Judgment Rule and Other Considerations*, 20 GA. L. REV. 565, 603 (1986).

<sup>120</sup> *Dodge*, 170 N.W. at 684.

uous. It does not explain, according to Easterbrook and Fischel,

why the same judges who decide whether engineers have designed the compressors on jet engines properly, whether the farmer delivered pomegranates conforming to the industry's specifications, and whether the prison system adversely affects the mental states of prisoners cannot decide whether a manager negligently failed to sack a subordinate who made improvident loans.<sup>121</sup>

Law and economics theorists like Easterbrook and Fischel have thus offered an alternative rationale. Predictably perhaps, for them it comes down to the market. The key point is not that judges are incompetent with regard to business; rather, it is that judges are not a part of the business world. In other words, "[i]t is better to insulate honest decisions from review than to expose managers and directors to review from judges and juries who do not face market pressures."<sup>122</sup> The occasionally Olympian perspective of judges, in particular, may skew business decisions insofar as "[t]he much-heralded independence of judges . . . although desirable for other reasons, makes judges particularly poor candidates to make business decisions because it frees them from the contractual and market mechanisms that encourage sound decisionmaking."<sup>123</sup> The business judgment rule, then, acts as a kind of filter, one that keeps the market-driven corporation pure of nonmarket-driven impulses. The underlying duty is not enforced by courts but by the markets—primarily the market for capital and the market for corporate control.

One difficulty in accepting this justification is the continued support by law and economics scholars for maintaining the underlying legal duty of maximizing shareholder wealth. If courts should keep out of the market, and if the market is sufficient to keep managers well-attuned to the interests of the shareholders, then one might suppose that the most efficient

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<sup>121</sup> EASTERBROOK & FISCHEL, *supra* note 81, at 94; *see also* Balotti & Hanks, *supra* note 76, at 1342 ("Courts readily plunge into many areas . . . where they have only limited or no experience and where their expertise, if any, is not obvious. Their forays into these areas, while often lamented, are not widely regarded as turning courts into unacceptably intrusive supervisors of persons working in these areas.").

<sup>122</sup> EASTERBROOK & FISCHEL, *supra* note 81, at 100.

<sup>123</sup> Daniel R. Fischel, *The Business Judgment Rule and the Trans Union Case*, 40 BUS. LAW. 1437, 1443 (1985).

way to achieve this outcome is to jettison this underlying duty. Yet law and economics scholars are generally very much in favor of maintaining and protecting it.<sup>124</sup>

Thus one important assumption binds these two prominent explanations for the BJR: the continued importance of the underlying duty to maximize shareholder wealth. Under both these rationales for the BJR, courts are not the best mechanism to enforce the underlying duty because of lack of expertise or insulation from market pressures. Yet, the duty is taken as a given. In other words, with these rationales the apparent paradox between the strict underlying duty and the deference of the BJR is a false one. The BJR is based on an institutional concern about enforcement and should not be seen as a retreat from the underlying duty.

### C. *Testing the Dominant Explanations with Seminal Cases*

Are institutional reasons the best way to understand and justify the business judgment rule? In answering this question, it is useful to review two of the seminal, or canonical, cases in the development of the BJR.

One such case was *A.P. Smith Mfg. Co. v. Barlow*.<sup>125</sup> In that case, the board of directors of the A.P. Smith Company decided to donate \$1,500 of the corporation's money to Princeton University.<sup>126</sup> When shareholders voiced their displeasure, the company sought a declaratory judgment from the

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<sup>124</sup> See Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1264 (1982). There is a third, less prominent theory that argues that the BJR reflects the need to encourage directors to act in accordance with their expertise without incurring liability. One might refer to this as the practical rationale. Samuel Arsht, for instance, argues that the premises of the business judgment rule are simply that "as human beings, directors are not infallible and are not able to please all of the stockholders all of the time." Arsht, *supra* note 77, at 95. Thus, "[t]he business judgement rule grew principally from the judicial concern that persons of reason, intellect, and integrity would not serve as directors if the law exacted from them a degree of prescience not possessed by people of ordinary knowledge." *Id.* at 97. The difficulty with this practical rationale is that it does not explain why the BJR is more deferential to business decisions than other kinds of decisions at issue in, say, tort suits. Also, if deference is truly necessary to entice people of good will to be directors, it would not explain why this end could not be satisfied by the relaxation of the underlying duty rather than a relaxation of the methods by which to satisfy it.

<sup>125</sup> 98 A.2d 581 (N.J. 1953).

<sup>126</sup> See *id.* at 582.

New Jersey Supreme Court validating the donation.<sup>127</sup> The court began by tracing the evolution of corporations from entities chartered for the public benefit (in the eighteenth century) to ones organized solely toward the end of private profit (in the nineteenth century).<sup>128</sup> With this evolution, "a concomitant . . . common-law rule developed that those who managed the corporation could not disburse any corporate funds for philanthropic or other worthy public causes unless the expenditure would benefit the corporation."<sup>129</sup>

The court went on to suggest, however, that this nineteenth-century common-law rule was somewhat anachronistic, even potentially pernicious, in a modern era in which private wealth was concentrated in the coffers of massive corporations.<sup>130</sup> Thus, in order to adapt the rule to the modern era, "courts . . . have applied it very broadly to enable worthy corporate donations with indirect benefits to the corporation."<sup>131</sup> Having acknowledged that the rule requiring corporations to maximize profit had come to be interpreted flexibly, the *A.P. Smith* court nonetheless asserted that corporate donations could be justified even under its strictest interpretation.<sup>132</sup> This was because "free and vigorous non-governmental institutions of higher learning are vital to our democracy and the system of free enterprise," societal forms which in turn "give [ ] [corporations] existence."<sup>133</sup> Thus, the *A.P. Smith* court seemed to rely as much on a notion that the underlying duty should be adjusted for modern times as on any notion of judicial deference to the market or to greater business acumen.

*A.P. Smith*, then, would appear to pose some dilemmas for both the traditional and the law and economics models. First, the *A.P. Smith* court refused to make the self-effacing assertion that business decisions used some unintelligible calculus beyond the ken of the judicial system. Second, the corporate donation in *A.P. Smith* was not idiosyncratic—it was not a market aberration. The donation was one that any board of

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<sup>127</sup> See *id.*

<sup>128</sup> *Id.* at 583.

<sup>129</sup> *Id.* at 584 (citations omitted).

<sup>130</sup> See *A.P. Smith*, 98 A.2d at 584.

<sup>131</sup> See *id.* at 585.

<sup>132</sup> *Id.* at 586.

<sup>133</sup> *Id.* at 590.

directors might make, yet only the most strained and elaborate extrapolation from the fiduciary duty could conclude that it was profit oriented. The key to the court's decision upholding the donation may have been the court's wariness about the nineteenth-century common-law innovation requiring that profit be the touchstone of corporate decisionmaking. The court kept returning to the implicit suggestion that the rule must be modified and its rigidity ameliorated to accommodate real business decisions. It was as if the business judgment rule was not a matter of judicial deference but more an organic balance to the underlying duty—the necessary corrective to the duty's rigidity. As such, it may also have been a legal incarnation of a more humanistic, and more tenable, model of decisionmaking in general.

Following *A.P. Smith* in the line of classic business judgment rule cases is *Schlensky v. Wrigley*.<sup>134</sup> *Schlensky* involved a derivative suit in which the shareholders attempted to force the Chicago Cubs to install lights and provide for night games in the Cub's ballpark, Wrigley Field.<sup>135</sup> The most prominent of the defendant directors was Philip Wrigley, who was also president of the corporation and its majority owner.<sup>136</sup> Citing Wrigley's comments that "baseball is a 'daytime sport,' and that installation of lights and night baseball games [would] have a deteriorating effect upon the surrounding neighborhood," the plaintiff alleged that Wrigley and the other directors were acting contrary to the proper interests of the corporation.<sup>137</sup>

The court started from the proposition that "the authority of the directors in the conduct of the business of the corporation must be regarded as absolute when they act within the law, and the court is without authority to substitute its judgment for that of the directors."<sup>138</sup> This statement resonates with judicial deference. The court proceeded to suggest a number of plausible explanations for the directors' decision not to implement lights at Wrigley Field, including a notion that

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<sup>134</sup> 237 N.E.2d 776 (Ill. App. Ct. 1968).

<sup>135</sup> *Id.* at 777.

<sup>136</sup> *See id.*

<sup>137</sup> *See id.* at 778.

<sup>138</sup> *Id.* at 779 (quoting *Helfman v. American Light & Traction Co.*, 187 A. 540, 550 (N.J. 1923)).



neighborhood decay might affect attendance, and a concern for the ballpark's property value.<sup>139</sup> The court emphasized that it was not making a decision as to the overall, balance-sheet prudence of the directors' reluctance to institute night games. Instead, blending formalism and self-effacement, the court protested that such a judgment would be "beyond our jurisdiction and ability."<sup>140</sup> It would also (or therefore) contravene the business judgment rule insofar as "the decision [was] one properly before directors and the motives alleged in the amended complaint showed no fraud, illegality or conflict of interest in the making of that decision."<sup>141</sup>

One can thus see *Schlensky* as consistent with the traditional rationale for the BJR, i.e., that it is "beyond [the] . . . ability"<sup>142</sup> of courts to decide whether a business decision was wisely made. One could also argue that the case is consistent with the law and economics model; that is, the market apparatus is being preserved from non-market-oriented impulses.<sup>143</sup> Thus, it is better to indulge Philip Wrigley's financially dubious conduct than to allow judges and juries to impose their notions of business on the Chicago National League Ball Club. Wrigley, however quixotic, is a creature of the market and he will live with the market repercussions of his decisions; judges and juries will not.

But it is also reasonable to view *Schlensky's* use of the BJR as a more fundamental attack on the underlying duty. It would not take a degree from the University of Chicago School of Business to establish that Phillip Wrigley was almost certainly making a poor business decision when he refused to place lights in Wrigley Field so that the Cubs could play night games.<sup>144</sup> Every other major league baseball team played night baseball. The Chicago White Sox, playing across town at Comiskey Park, played night games and outdrew the Cubs significantly.<sup>145</sup> The supposed business justification for the refusal to install lights—that night games would cause the

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<sup>139</sup> *Schlensky*, 237 N.E.2d at 780.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> See EASTERBROOK & FISCHER, *supra* note 81, at 100.

<sup>144</sup> *Schlensky*, 237 N.E.2d at 777.

<sup>145</sup> See *id.*

neighborhood to decay and thus hurt the property value of the ballpark—was not only long-term and indirect but also quite clearly wrong.

But if the justifications were strained from a business perspective, they made much more sense from a non-financial perspective. Wrigley may have felt a loyalty to the game's tradition and to the neighborhood surrounding his club's park. A strict application of the underlying duty to maximize profits would have prevented him from taking such non-financial considerations into account. To be sure, the facade of the opinion serves the underlying duty through its rhetoric, but the opinion is consistent with a belief that the BJR is more about correcting the underlying duty than about who should enforce it.

#### D. *A New Explanation for the Business Judgment Rule*

Thus, neither of the existing dominant theories of the business judgment rule is mandated by the seminal cases defining it. Moreover, in some important respects, the cases are aligned with a notion that the rule is more about an underlying distrust of the strict fiduciary duty to maximize shareholder returns than about concerns surrounding how the duty should be enforced. This, we propose, is the genuine, underlying explanation for the existence and power of the BJR in the face of an apparently inconsistent duty to serve the shareholders. As Dickens suggests in *Hard Times*, a manager acting as the strict duty would require him to act would be seen as irrational or childish. The BJR is thus a necessary corrective device to the irrationality of the underlying duty.

To describe this proposed explanation more thoroughly, it is worth returning to the work of Martha Nussbaum and specifically to the theory of judgment that Nussbaum attributes to Aristotle. Besides launching a critique of scientific rationality, Nussbaum's work also advances a more humanistic model of decisionmaking. This theory has three main components: first, an appreciation for the particular; second, an openness to experience; and third, an emphasis on correct perception.<sup>145</sup>

Nussbaum first addresses particularity, which may be

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<sup>145</sup> NUSSBAUM, *Discernment of Perception*, *supra* note 49, at 54.

understood as a kind of refutation of the rationalist premise of commensurability. Rather than viewing the particular as an instance of a larger, more abstract phenomenon, Aristotle and Nussbaum are determined to examine the particular upon its own terms. As Nussbaum explains,

[T]he Aristotelian agent scrutinizes each valuable alternative, seeking out its distinct nature. She is determined to acknowledge the precise sort of value or goodness present in each of the competing alternatives, seeing each value so to speak as a separate jewel in the crown, valuable in its own right, which does not cease to be separately valuable just because the contingencies of the situation sever it from other goods, and it loses out in an overall rational choice.<sup>147</sup>

It is this appreciation for the particular which leads necessarily to an openness to, and a valuing of, experience. While a scientific rationalist finds, at most, confirmation in each new experience, Aristotle and Nussbaum find another facet of wisdom. Nussbaum's Aristotle insists that experience is especially integral to proper conceptions of justice because the "the experienced judgments of the agent must both correct and supplement the general and universal formulations of law."<sup>148</sup> To be sure, this is a less tidy way of knowing, but it may ultimately be a truer one in that "the content of rational choice must be supplied by nothing less messy than experience and stories of experience."<sup>149</sup>

Experience avails the decisionmaker very little, however, without correct perception. It is in perception that rules play their part, not as agents of coerced conformity but as guideposts of sorts. Rules may thus supply analogies assisting us in contextualizing and assimilating experience. In turn, rules may shift with experience and the analogies may change their shade. In other words, "perception . . . is a process of loving conversation between rules and concrete responses, general conceptions and unique cases, in which the general articulates the particular and is in turn further articulated by it."<sup>150</sup>

To Nussbaum, literature has great importance in that it

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<sup>147</sup> NUSSBAUM, *Discernment of Perception*, *supra* note 49, at 63.

<sup>148</sup> NUSSBAUM, *Discernment of Perception*, *supra* note 49, at 69.

<sup>149</sup> NUSSBAUM, *Discernment of Perception*, *supra* note 49, at 74.

<sup>150</sup> NUSSBAUM, *Discernment of Perception*, *supra* note 49, at 95.

may teach us how to perceive correctly. Novels supply what appears to be random experience and then show us its pattern, or show what appears to be one pattern of experience and reveal it as another altogether.<sup>151</sup> Thus, just as Gradgrind is educated by experience, we are educated by Gradgrind. The right perception that we learn from literature may be applied to realms of unauthored (or unselfconsciously-authored) experience, such as that of law.<sup>152</sup>

Nussbaum's Neo-Aristotelian theory of decisionmaking, and its correlative critique of scientific rationalism is not completely foreign to legal circles. Justice Brennan, for example, was suggesting something similar to Nussbaum's theory when he championed "passion" as a basis for legal judgment. By "passion," Justice Brennan meant "the range of emotional and intuitive responses to a given set of facts or arguments, responses which often speed into our consciousness far ahead of the lumbering syllogisms of reason."<sup>153</sup> Indeed, Justice Brennan traced this counterpoint to rationalism back at least as far as Justice Cardozo, who, according to Brennan, "insisted that we consider the role that human experience, emotion, and passion play in the judicial process."<sup>154</sup>

More recently, proponents of the law and literature school have reinvigorated the argument for some sort of humanist alternative to rationalist theories of legal judgment. Professor Paul Gewirtz, for example, has looked to Aeschylus's *Oresteia* in order to articulate such an alternative.<sup>155</sup> In fact, Gewirtz's

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<sup>151</sup> NUSSBAUM, *Discernment of Perception*, *supra* note 49, at 95 ("[N]ovels, as a genre, direct us to attend to the concrete; they display before us a wealth of richly realized detail, presented as relevant for choice.").

<sup>152</sup> NUSSBAUM, *Discernment of Perception*, *supra* note 49, at 100 ("The dialogue between rule and perception in Aristotelian morality has a close and interesting relationship to the procedures of a good [legal] judge, who must bring to bear, in the concrete situation, her knowledge of law, the history of precedent, her own sense of the moral convictions embodied in the law, and her understanding of the case before her."). This view has been attacked by Alan Dershowitz, among others. See Alan Dershowitz, *Life Is Not a Dramatic Narrative*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 99 (Peter Brooks & Paul Gewirtz, eds.), Like Nussbaum, Dershowitz suggests that law should reflect human experience, but Dershowitz argues that human experience is too random and chaotic to be "cabined into the structure of nature." *Id.* at 105.

<sup>153</sup> William J. Brennan, Jr., *Reason, Passion, and "The Progress of the Law,"* 10 CARDOZO L. REV. 3, 9 (1988).

<sup>154</sup> *Id.* at 5.

<sup>155</sup> Paul Gewirtz, *Aeschylus' Law*, 101 HARV. L. REV. 1043, 1049 (1988) ("Aes-

reading of Aeschylus's tragic cycle leads him to a conclusion quite similar to that of Nussbaum, namely, that "[i]t is foolish and perhaps dangerous . . . to imagine that law can or should be made perfectly rational. In part, nonrational forces have a place in law simply because 'law's terrain . . . must be the realities of life, in all their tangled complexity.'"<sup>156</sup>

Martha Minow and Elizabeth Spelman have made similar arguments. In addition, they have pointed out that the great benefit of scientific rationalism, predictability, is largely chimerical insofar as the results of deducing one's decision from a fixed premise are not predictable at all. "[W]hile it can calculate and produce predictable decisions, given certain laws and provided particular facts, it cannot consider how such decisions will affect individual people nor may it reconsider its initial judgment in light of such actual or unanticipated effects."<sup>157</sup> According to Minow and Spelman, it is cognizance of the "actual" ramifications of one's judgment that makes for "careful thinking."<sup>158</sup>

Returning to the paradox posed by the coexistence of directors' rigid fiduciary duty to maximize profits and the apparent leniency of the business judgment rule, we might view the former as the sort of algorithmic approach to decisionmaking repudiated by Gradgrind, Nussbaum, Aristotle, and their counterparts in the law and literature movement. As noted earlier, the fiduciary duty to maximize shareholder profit clearly bears the dual hallmarks of scientific rationalism: commensurability and metricity. In the case of the fiduciary duty to maximize profits, the single commensurable unit of value is, of course, monetary, and the metric is simply its maximization.

In contrast, the business judgment rule functions in much the same way as Nussbaum's Neo-Aristotelian theory of decisionmaking. It allows for an appreciation for the particular, an

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chylus reveals a more haunting view of law: law is not and cannot be an enterprise of reason alone; it includes the nonrational emotions as an essential and central ingredient.").

<sup>156</sup> *Id.* at 1049 (quoting Paul Gewirtz, *A Lawyer's Death*, 100 HARV. L. REV. 2053, 2055 (1987)).

<sup>157</sup> Martha L. Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37, 42 (1988).

<sup>158</sup> *Id.* at 44.

openness to experience, and the possibility of something like perception. Guided by the evidence concerning the circumstances in which (and the information on which) the directors made their decision, the judicial inquiry is not "whether the decision made was correct or one which the court would have made," but "whether the evidence does or does not establish that the directors exercised due care and believed, on a reasonable basis, that the challenged transaction was in the corporation's best interest."<sup>159</sup> In other words, it is not an inquiry as to the "rightness" of the decision but about whether a decision, in the Aristotelian sense, was made at all.

The tendency of the business judgment rule to validate the particular is evident in a case like *Schlensky v. Wrigley*.<sup>160</sup> Indeed, *Schlensky* may be read as a triumph of the particular (the particular dangers that lights posed to the neighborhood and to the park's property value) over the general (the general trend toward lighted ballparks, night games and profit-driven sports enterprises).

In a sense, then, the Aristotelian rationale parallels the traditional rationale behind the business judgment rule.<sup>161</sup> While it is indeed disingenuous to assert that judges lack the "ability" to fathom these business decisions,<sup>162</sup> it is something different to suggest that judges place a premium on experience when evaluating business decisions. The ledger book does not always do justice to the "tangled complexity" of business decisions. Only experience can allow one to act with "flexibility, responsiveness, and openness to the external."<sup>163</sup> The business judgment rule accommodates this by allowing judges to defer to the experience of directors.

The business judgment rule thus incorporates many components of Aristotelian rationality. Just as Gradgrind realizes that he must release himself from the irrationality of a utilitarian calculus, corporate law has used the BJR to release corporate managers from the irrationality—and perhaps the

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<sup>159</sup> Arsht, *supra* note 77, at 118.

<sup>160</sup> 237 N.E.2d 776 (Ill. App. Ct. 1968).

<sup>161</sup> See *supra* notes 118-20 and accompanying text.

<sup>162</sup> *Schlensky*, 237 N.E.2d at 780; cf. EASTERBROOK & FISCHER, *supra* note 81, at 94 (questioning "why same judges who decide whether engineers have designed the compressors on jet engines properly," cannot make business judgements).

<sup>163</sup> NUSSBAUM, *Discernment of Perception*, *supra* note 49, at 74.

inhumanity—of the strict fiduciary duty to maximize value to the shareholders. Without the liberation of the BJR, the law would force corporate managers to act like the “uneducated” Gradgrind: obtuse, unattuned to the particularities and complexities of each decision, and unable to take account of value that is not translatable to the single metric of shareholder wealth. With the BJR, however, corporate managers are liberated in some respects from the irrationality required of them by the underlying duty that the law has established.

#### IV. THE BUSINESS JUDGMENT RULE AS SECOND BEST

Even taking into account the humanistic effect of the business judgment rule, it is important to recognize that the law—like the educated Gradgrind—is not yet at rest. At the completion of the novel, Gradgrind “mistrusts” himself. This mistrust derives from a growing suspicion as to the flawed nature of the utilitarian ethic. It is not only that, however. Perhaps Dickens wants the reader to recognize that Gradgrind’s journey is hardly over; that without some other ethic to put in place of utilitarianism, Gradgrind is still ethically at sea. Further, Dickens may believe that mistrust of one’s own ability to make perfect judgments is an important part of a correct ethical stance toward the world. In either case, corporate law has much to learn from Dickens’s critique of utilitarianism and from Gradgrind’s ultimate mistrust of himself. Corporate law should experience, and admit to, similar mistrust.

There are at least two grounds for mistrust of contemporary corporate law. One has been stated in the first portion of this article.<sup>164</sup> Similar to Gradgrind’s recognition of the flawed nature of the underlying utilitarian ethic of his time, corporate law should recognize that the underlying utilitarianism-based duty of corporate law asks managers to act irrationally. The second reason corporate law should mistrust itself is that the BJR provides managers with only a second-best solution. As we have seen, the BJR gives managers some flexibility in pursuing profit, but the underlying duty remains intact. In *Hard Times*, however, the late-novel Gradgrind does not ultimately believe that all that is needed is greater allowance with

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<sup>164</sup> See *supra* Parts I & II.

regard to the ways in which the underlying "good" of utility be served. This is how the BJR exerts its humanism within corporate law, however it leaves the law in an awkward position.

Consider again the seminal cases of *Dodge v. Ford*<sup>165</sup> and *Shelansky v. Wrigley*.<sup>166</sup> Henry Ford was a masterful businessman. At the time of the Dodge brothers' suit, the Ford Motor Company was averaging about \$20 million profit per year on an annual investment of a mere \$2 million.<sup>167</sup> One of the components of Ford's success was his decision to pay his workers a higher-than-market wage.<sup>168</sup> When the Dodge brothers, then shareholders in Ford Motor Company, complained about the company's failure to issue dividends, Henry Ford could have easily and correctly justified his policies as being consistent with the long-term interests of the shareholders. Yet, he chose to admit during the trial that profit was not his primary goal, and the Dodge brothers won their suit.<sup>169</sup> In contrast, Philip Wrigley was almost certainly making a poor business decision when he refused to place lights in Wrigley Field so that the Cubs could play night games. In *Shelansky's* suit however, the court deferred to Wrigley because he justified his actions on the grounds that it would be in the long-term financial interest of the ball club.<sup>170</sup>

Under a legal regime governed by the BJR, therefore, what the directors do appears to be less important than what they say they do. In effect, directors are forced to reaffirm the fiduciary duty to maximize profits rhetorically, even if they are acting against that duty in actuality. The business judgment rule props up the fiduciary duty to maximize profits—turning it into a shibboleth of sorts—even as it ameliorates its harsh-

<sup>165</sup> 170 N.W. 668 (1919).

<sup>166</sup> 237 N.E.2d 776 (1968).

<sup>167</sup> See WILLIAM A. KLEIN & J. MARK RAMSEYER, *BUSINESS ASSOCIATIONS: AGENCY, PARTNERSHIPS, AND CORPORATIONS* 270 (3d ed. 1997).

<sup>168</sup> See *id.* at 271 n.1 (citing P. COLLIER & D. HOROWITZ, *THE FORDS: AN AMERICAN EPIC* 66-67 (1987)).

<sup>169</sup> In court, Ford was asked for what purposes Ford Motor Company was organized. He answered that it was "[o]rganized to do as much good as we can, everywhere, for everybody concerned . . . And incidentally to make money." A. NEVINS & F. HILL, *FORD, EXPANSION AND CHALLENGE, 1915-1933*, at 99 (1957). In an interview with *Detroit News*, Ford also said, "I do not believe we should make such an awful profit on our cars. A reasonable profit is right, but not too much." *Id.* at 97.

<sup>170</sup> See *Shelansky*, 237 N.E.2d at 180-81.



ness. Thus, even if the BJR, in fact, releases corporate directors from the legal requirement of being automatons, they must be sure not to admit their freedom.

In this respect contemporary corporate law is not as advanced as the mind-set of the educated Gradgrind. The BJR allows managers to avoid the worst of the irrationalities of the strict, utilitarian-based duty to maximize shareholder wealth. But in comparison to the educated Gradgrind, who has learned to mistrust the utilitarianism itself and seems to seek a release from it, corporate law is still clearly attached to the irrationality of profit maximization. Even with the BJR's deference to managers' decisions, the managers must still pay rhetorical homage to the strict underlying duty.

To be sure, evidence of Gradgrind-like development exists within corporate law. Almost thirty states have adopted statutes allowing corporate managers to take into account the needs of stakeholders other than shareholders.<sup>171</sup> This trend reveals a mistrust of the underlying duty in that those statutes allow managers to make decisions on some basis other than shareholder wealth maximization. They do more than the BJR because they expand the definition of the underlying duty rather than simply expanding the manner in which it can be served.<sup>172</sup> In this respect, they allow managers and directors to be more rational than under the strict profit-maximization rule. Directors and managers can be more attuned to the particularities of each business decision, which improves their

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<sup>171</sup> The scholarship on the so-called constituency statutes is fairly extensive. See, e.g., David Millon, *Communitarianism in Corporate Law*, in *PROGRESSIVE CORPORATE LAW* (Lawrence Mitchell ed., 1995); William J. Carney, *Does Defining Constituencies Matter?*, 59 U. CIN. L. REV. 385 (1990); James J. Hanks, Jr., *Playing with Fire: Nonshareholder Constituency Statutes in the 1990s*, 21 STETSON L. REV. 97 (1991); Charles Hansen, *Other Constituency Statutes: A Search for Perspective*, 46 BUS. LAW. 1355 (1991); Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23, 33-35 (1991); Morey W. McDaniel, *Stockholders and Stakeholders*, 21 STETSON L. REV. 121 (1991); Steven M.H. Wallman, *The Proper Interpretation of Corporate Constituency Statutes and Formulation of Director Duties*, 21 STETSON L. REV. 163 (1991).

<sup>172</sup> See, e.g., Wallman, *supra* note 171, at 170-71; see also Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579, 580-581 (1992) (suggesting that constituency statutes "would put to rest the notion that directors are in any sense agents of the stockholders and that stockholders are thus the exclusive beneficiaries of directors' duties").

ability to consider their decision with care.

These statutes do not represent the dominant rule within corporate law, however. As noted earlier, the rule that shareholder interests are supreme holds firm in Delaware, the key jurisdiction for corporate law in the United States. One must only remember Chancellor Allen's proclamation: "It is the obligation of directors to attempt, within the law, to maximize the long-run interests of the corporation's shareholders; that they may sometimes do so 'at the expense' of others . . . does not for that reason constitute a breach of duty."<sup>173</sup> Even outside Delaware, the shareholder-dominant view of corporate law continues as a presumption.<sup>174</sup> It is still extremely rare for courts to endorse the view that corporate directors may consider the interests of other constituencies without reference to shareholder return.<sup>175</sup> As Lawrence Mitchell urges, "[t]here is no serious disagreement with the proposition that directors' fiduciary duties are directed towards the stockholders."<sup>176</sup>

Moreover, even in those states that have adopted stakeholder statutes, the statutes typically suffer from one of the flaws of the BJR—their dominant effect is to release from responsibility rather than to augment responsibility.<sup>177</sup> These

<sup>173</sup> *Katz v. Oak Indus.*, 508 A.2d 873, 879 (Del. Ch. 1986) (citation omitted).

<sup>174</sup> *Dodge*, still the paradigm case, is of course from Michigan.

<sup>175</sup> As of 1992, Professor Lawrence Mitchell could state that, to his knowledge, no court had squarely endorsed such a view. Lawrence E. Mitchell, *A Critical Look at Corporate Governance*, 45 VAND. L. REV. 1263, 1284 n. 79 (1992). Mitchell does, however, cite one possible exception, *Herald Co. v. Seawall*, 472 F.2d 1081 (10th Cir. 1972) (holding that the business judgement rule protects directors who choose to create employee stock option plan even though purchase of stock for plan caused corporation to lose money), but even that opinion is replete with references to the manner in which the interests of the shareholder are advanced by the employee stock option plan. *See id.* at 1094-97.

<sup>176</sup> Mitchell, *supra* note 175, at 1264 n.2, at 1284; *see also Dodge*, 170 N.W. at 684 ("The discretion of directors is to be exercised in the choice of means to attain [the end of the maximum profit for the shareholders], and does not extend to a change in the end itself. . . .").

<sup>177</sup> Connecticut is the only state that requires, rather than permits, corporate directors to consider the interests of non-shareholder constituencies:

[A] director of a corporation . . . shall consider, in determining what he reasonably believes to be the best interests of the corporation, (1) the long-term as well as the short-term interests of the corporation, (2) the interests of the shareholders, long-term as well as short-term, including the possibility that those interests may be best served by the continued independence of the corporation, (3) the interests of the corporation's employees, customers, creditors, and suppliers, and (4) community and

stakeholder statutes originated in efforts by states to protect native businesses and their management from takeovers, especially on the part of out-of-state acquirors.<sup>178</sup> Without these statutes, the directors of a target company would typically be required to sell the company to the highest bidder even if doing so would mean that local control, and perhaps local jobs, would be lost.<sup>179</sup> With these statutes, corporate managers have greater ability to decline the takeover offer by claiming that the takeover would harm employees or some other stakeholders.<sup>180</sup>

These statutes have thus been the subject of a powerful critique. Even though they give corporate directors the ability to take account of the needs of stakeholders other than shareholders, they do so at the price of also giving directors the power to make decisions with none of the stakeholders in mind, as long as such decisions are cloaked in the rhetoric of stakeholder concern.<sup>181</sup> These statutes have no substance<sup>182</sup>

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societal considerations including those of any community in which any office or other facility of the corporation is located.

CONN. GEN. STAT. ANN. §§ 33-313, 33-756 (West 1987). According to Charles Hansen, of the states with stakeholder statutes only Iowa, Indiana, and Pennsylvania (in addition to Connecticut) permit directors to place other constituencies on the same footing as shareholders. Hansen, *supra* note 171, at 1370, 1375.

<sup>178</sup> The first of these statutes was adopted in Pennsylvania in 1983 and amended in 1990. The law declared that the management of a company incorporated in Pennsylvania could, in making the corporate decisions, consider the effects of such acts on the employees, suppliers, customers, and communities in which offices or other establishments of the corporation were located. 15 PA. CONS. STAT. §§ 515(b), 171(b); see also Kent Greenfield, *From Rights to Regulation in Corporate Law*, in 2 PERSPECTIVES ON COMPANY LAW 1, 3-4 (Fiona Patfield ed.; 1997). The political impetus behind the passage of the Pennsylvania statute was the fear of corporate takeovers of Pennsylvania companies and the subsequent loss of jobs in the state. See Steven Lipin, *Conrail Fight May Hinge on Pennsylvania Law*, WALL ST. J., Oct. 28, 1996, at C1 (noting that 1990 amendments to Pennsylvania statute were adopted when Belzbergs of Canada were fighting for Pennsylvania-based Armstrong World Industries); Nell Minow, *Shareholders, Stakeholders and Boards of Directors*, 2 STETSON L. REV. 197, 220 (1991).

<sup>179</sup> See *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986) (concluding that concern for non-shareholder constituencies is "inappropriate" when "auction" among various active bidders is taking place).

<sup>180</sup> See Wallman, *supra* note 171, at 183-87. For an example of how the statute works in practice, see Lipkin, *Supra*, note 178, at C1; Steven Lipkin & Anna Wilde Mathews, *CSX Wins Ruling in Bid to Buy Conrail, Setting Back Rival Norfolk Southern*, WALL ST. J., Nov. 20, 1996; Steven Lipkin & Anna Wilde Mathews, *Seeking Concessions from CSX-Conrail Is Seen as Most Likely Move by Norfolk*, WALL ST. J., Oct. 17, 1996, at A10.

<sup>181</sup> Commenting on a proposed stakeholder statute in New York, then-Commis-

and cannot typically be enforced by any non-shareholder constituency.<sup>183</sup> They protect directors but ask for little in return.

This is not to say that these constituency statutes are a bad idea as a normative matter. Even though concern for stakeholders was not the statutes' primary impetus, stakeholders other than shareholders will almost certainly be among the statutes' beneficiaries. Moreover, the statutes should be applauded—as the BJR should be—for allowing

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sioner Grundfest of the United States Securities and Exchange Commission remarked:

The grant of authority without accountability raised the real and present danger that boards will use [the stakeholder statute] as a fig leaf. Specifically, [the statute] may allow boards to rationalize decisions that they would not otherwise support in the name of constituencies who are powerless to monitor or challenge the actions that are purportedly taken in their interest.

Letter from Joseph A. Grundfest, Commissioner, Securities Exchange Commission, to Mario Cuomo, Governor of New York (June 6, 1989), *quoted in* Mitchell *supra* note 172, at 580 & n.4; *see also* Committee on Corporate Takeover Legislation, Ass'n of the Bar of the City of N.Y., Report on Governor's Program Bill No. 128 and Subsequent Amendments (1989), *reprinted in* LAWRENCE E. MITCHELL & LEWIS D. SOLOMON, *CORPORATE FINANCE AND GOVERNANCE: CASES, MATERIALS, AND PROBLEMS FOR AN ADVANCED COURSE IN CORPORATIONS* 539 (1992); Committee on Corp. Laws, ABA Business Law Section, *Other Constituencies Statutes: Potential for Confusion*, 45 BUS. LAW. 2253 (1990) (articulating concern that stakeholder statutes may "pose potential for mischief"); Carney, *supra* note 171, at 418; Hanks, *supra* note 171, at 24.

<sup>182</sup> For Professor Mitchell's proposal suggesting a manner in which to interpret these statutes so as to give them substance, see Mitchell, *supra* note 172. Unfortunately, Mitchell's proposed interpretation has not yet been adopted by any court.

<sup>183</sup> In fact, several statutes explicitly deny that they create any enforceable duty to the constituencies whose interests may be considered. *See, e.g.,* GA. CODE ANN. § 14-2-202(b)(5) (Michie 1991) (declaring that the director's authority is discretionary and "shall not be deemed to provide to any constituency any right to be considered"); N.Y. BUS. CORP. LAW § 717(b) (McKinney Supp. 1991) (providing that "nothing in this paragraph shall create any duties owed by any directors to any person or entity to consider or afford any particular weight" to nonshareholder considerations or abrogate any existing directorial duties). Even the Connecticut statute, which makes concern for non-shareholder constituencies mandatory rather than permissive, *see supra* note 177, does not allow anyone other than shareholders to sue directors for a breach of duty. *See* McDaniel, *Stockholders and Stakeholders*, *supra* note 171, at 160. Thus, even the Connecticut statute does not impose additional enforceable duties on the part of corporate managers. Some commentators, however, most notably David Millon and Lawrence Mitchell, have argued that the stakeholder statutes should be interpreted to give non-shareholders standing to sue. *See* Mitchell, *supra* note 172; David Millon, *Redefining Corporate Law*, 24 IND. L. REV. 223, 259. These proposals have not yet been adopted by courts.

corporate directors to act more rationally than they could under a rule requiring the maximization of shareholder wealth.

Nevertheless, while both the BJR and stakeholder statutes are improvements, they both must be recognized as flawed and imperfectly rational. The BJR is still linked to the underlying duty of maximizing shareholder wealth and merely offers freedom with regard to the method by which the duty is pursued. Stakeholder statutes release managers from the duty to maximize shareholder wealth but replace that duty with a standard that is largely empty of substance. They are both reactions to the irrationality of the underlying duty, as neither would exist but for the underlying flaws of corporate law.

Moreover, it is important to note that both the BJR and the stakeholder statutes are typically permissive rather than mandatory. Even with the BJR, and even in a state that has a stakeholder statute on its books, a corporate director can protect herself from personal liability for a breach of fiduciary duty simply by voting in every case to maximize value to shareholders. The law may give directors the option to act more rationally than the underlying duty would require, but it is just that—an option. It is easier, and safer from the standpoint of avoiding suit, simply to make whatever investigations one must undertake to figure which decision has the highest expected monetary return to shareholders and then to pursue that course of action. Thus, even with the BJR and stakeholder statutes, corporate law is still very much akin to the uneducated Gradgrind of the early pages of *Hard Times*.

#### V. SKETCHING A RATIONAL, ARISTOTELIAN MODEL OF CORPORATE LAW FIDUCIARY DUTIES

The underlying duty in corporate law—to maximize shareholder returns—forces corporate managers to act irrationally. The development of the business judgment rule has served to mitigate this irrationality and has allowed managers to act in a manner that more closely aligns with Aristotelian rationality. But corporate law is still imperfect, even with the BJR and stakeholder statutes, because it remains closely tied to an irrational underlying duty.

A corporate law that encourages irrationality is not the only choice. Corporate law could be based on a set of legal

duties that would allow—indeed expect—directors to act rationally. An expansive elaboration upon such duties and a defense of them lie beyond the scope of this Article. But we can offer a glimpse of what corporate law doctrine might look like if it were based on Aristotelian norms of rationality and decisionmaking.

A few words about the importance of this effort are in order, as existing corporate law doctrine has been under increasing attack recently.<sup>184</sup> The topics of corporate social responsibility, corporate democracy, and communitarianism in corporate law have enjoyed a resurgence of interest in the academy and even among the public at large.<sup>185</sup> Yet the proponents of this new trend have been criticized for failing to provide a theoretical alternative to existing corporate law doctrine.<sup>186</sup> The criticism has been that the “communitarians” only have critiqued and have not been successful in providing a genuine alternative upon which corporate law could be based. Fleshing out an Aristotelian version of corporate law could go far in responding to this criticism and in providing a theoretic-

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<sup>184</sup> See, e.g., PROGRESSIVE CORPORATE LAW, *supra* note 171; Ronald M. Green, *Shareholders as Stakeholders: Changing Metaphors of Corporate Governance*, 50 WASH. & LEE L. REV. 1409 (1993); Greenfield, *supra* note 178; David Millon, *New Directions in Corporate Law: Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373 (1993); Lawrence E. Mitchell, *Cooperation and Constraint in the Modern Corporation: An Inquiry into the Causes of Corporate Immorality*, 73 TEX. L. REV. 477 (1995); Mitchell, *supra* note 175; Lawrence E. Mitchell, *Groundwork of the Metaphysics of Corporate Law*, 50 WASH. & LEE L. REV. 1477 (1993); Mitchell, *supra* note 172; Karen L. Newman, *The Just Organization: Creating and Maintaining Justice in Work Environments*, 50 WASH. & LEE L. REV. 1489 (1993); Marleen A. O'Connor, *A Socio-Economic Approach to the Japanese Corporate Governance Structure*, 50 WASH. & LEE L. REV. 1529 (1993); Lewis D. Solomon, *On the Frontier of Capitalism: Implementation of Humanomics by Modern Publicly Held Corporations: A Critical Assessment*, 50 WASH. & LEE L. REV. 1625 (1993).

<sup>185</sup> See, e.g., Allan Sloan, *The Hit Men*, NEWSWEEK, Feb. 26, 1996, at 44; Louis Uchitelle & N.R. Kleinfield, *On the Battlefields of Business, Millions of Casualties*, N.Y. TIMES, Mar. 3, 1996, at A1; *Nightline: Interview with Albert Dunlap and Robert Reich* (ABC television broadcast, Feb. 14, 1996) (transcript available in LEXIS-NEXIS library); *Does America Still Work?* (Forum), HARPER'S, May 1996, at 35; *Corporations Under Fire* (Editorial), N.Y. TIMES, Feb. 25, 1996, at D14; Todd S. Purdum, *Corporations Have a Duty to Employees, Clinton Says*, N.Y. TIMES, Mar. 24, 1996, at A32; see generally CHARLES DERBER, *THE WILDING OF AMERICA* 70-75 (1996).

<sup>186</sup> Stephen M. Bainbridge, *Community and Statism: Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 873-75 (1997).

cal basis for communitarian corporate law. The following general principles might serve as good starting points in a discussion of a new paradigm for corporate law.

A. *Aristotelian Justice, or Fairness, as Metric*

Because one of the principal Aristotelian critiques of utilitarianism, and thus of corporate law, is the dependence on the maximization principle, the question, then, is what metric should guide business judgment once we disregard the maximization of profits. Aristotle, and Dickens, would likely suggest that corporate directors might be guided by Aristotelian justice, or fairness. For Aristotle, the two terms are contiguous insofar as "just means lawful and fair; and unjust means both unlawful and unfair."<sup>187</sup>

Aristotelian justice may be defined negatively as refraining from acting unjustly or unfairly. Thus according to Rawls, Aristotelian justice entails "refraining from *pleonexia*, that is, from gaining some advantage for oneself by seizing what belongs to another . . . or by denying a person that which is due to him."<sup>188</sup> What Rawls appears to be getting at is the notion that injustice involves taking too much, whether of money, pleasure, or whatever good. As Aristotle himself states, "the unjust man takes more than his share."<sup>189</sup> Sometimes this form of injustice or unfairness can consist in taking too little (e.g., of that which is a burden). Thus, Aristotle informs us that "[t]he unjust man does not always choose the larger share; of things that are bad in themselves he actually chooses the lesser share, but he is none the less regarded as trying to get too much."<sup>190</sup>

From this negative definition of Aristotelian justice (i.e., refraining from acting unjustly), we may move to an affirmative one; for, if injustice involves taking too much of what is good and too little of what is bad, we might say that justice

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<sup>187</sup> ARISTOTLE, *THE NICHOMACHEAN ETHICS* (Hugh Tredennick ed. & J.A.K. Thomson trans., Penguin Books 1976) (1953) [hereinafter *THE ETHICS*].

<sup>188</sup> RAWLS, *supra* note 31, at 10.

<sup>189</sup> *THE ETHICS*, *supra* note 187, at 172 ("[W]hen a man takes more than his share . . . what actuates him is certainly some kind of wickedness (because we blame it): viz., injustice."). *THE ETHICS*, *supra* note 187, at 175.

<sup>190</sup> *THE ETHICS*, *supra* note 187, at 173.

entails absorbing the proper, or proportionate, amount of both. Aristotle tells us that "justice is a sort of proportion."<sup>191</sup> Aristotle goes on to explain more fully the role of proportion in defining the relationship between injustice and justice:

What is just in this sense, then, is what is proportional, and what is unjust is what violates the proportion. So one share becomes too large and the other too small. This is exactly what happens in practice: the man who acts unjustly gets too much and the victim of injustice too little of what is good.<sup>192</sup>

Aristotelian justice then is quite the opposite of utilitarian justice with its goal of net maximization. Aristotelian justice is relatively indifferent to the grandeur of the total value, focusing instead on its distribution.

Is it unworkable to use a notion of fairness as the dominant guidepost for corporate doctrine? To be sure, the legacy of Aristotle's conception of justice as proportion appears in the works of legal philosophers, most notably H.L.A. Hart. Hart adopts this notion of distributive justice wholesale, defining justice "as maintaining or restoring a *balance* or *proportion*."<sup>193</sup> And so, Aristotelian justice is not alien to the law. Moreover, the concept of fairness is utilized today even in a number of areas of corporate law itself. Examples include the requirement of fairness in dealings between majority shareholders and minority shareholders in close corporations,<sup>194</sup> as well as the requirement that self-dealing transactions be fair to the corporation.<sup>195</sup>

Of course, one might object to the use of fairness as guidepost on the basis of the practical observation that perfect justice, like perfect distribution, exists only in the abstract. The response to this objection might be that justice as proportion necessarily inhabits a scale in which the goal is to behave

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<sup>191</sup> THE ETHICS, *supra* note 187, at 178; ("[W]hat is just is proportional."). THE ETHICS, *supra* note 187, at 178.

<sup>192</sup> THE ETHICS, *supra* note 187, at 179.

<sup>193</sup> H.L.A. HART, THE CONCEPT OF LAW 155 (1961).

<sup>194</sup> See, e.g., *Nixon v. Blackwell*, 626 A.2d 1366 (Del. 1993); *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657 (Mass. 1976).

<sup>195</sup> See WILLIAM L. CARY & MELVIN EISENBERG, CASES ON CORPORATIONS 684-88 (7th ed. 1995). Cf., e.g., Alison Grey Anderson, *Conflicts of Interest: Efficiency, Fairness and Corporate Structure*, 25 UCLA L. REV. 738 (1978); Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266 (1997).



more justly, not with absolute justice. After all, as the philosopher Stanley Cavell has noted, "any actual society will be imperfectly just,"<sup>196</sup> but that fact does not obviate society's responsibility to strive toward justice. Likewise, even if the corporate director cannot act with absolute justice, he or she should be obliged to make the decision that is more just in any given instance. That is, rather than acting to maximize shareholder profits, the director should act so as to achieve the better proportion of good and/or ill among the corporation's various stakeholders or constituencies. This is a metric that reflects reality without exploiting it, recognizing as it does that we are bound to confront an "uncertain measure of injustice, of inequalities of liberty and of goods that are not minimal, of delays in reform that are not inevitable."<sup>197</sup>

Moreover, a dependence on fairness rather than maximization will require the managers of a corporation to be very attuned to the context of their decisions. We discuss below the importance of looking for the particular in every decision, but it is also worth noting that the concept of fairness, in itself, requires an attentiveness to the specific circumstances of the decision. By its very nature, fairness—in the Aristotelian sense—requires a contextual judgment. We are reminded of Sissy Jupe's account to Louisa of her questioning by Mr. M'Choakumchild:

... "And he said, Now, this schoolroom is a Nation. And in this nation, there are fifty millions of money. Isn't this a prosperous nation? Girl number twenty, isn't this a prosperous nation, and an't you in a thriving state?"

"What did you say?" asked Louisa.

"Miss Louisa, I said I didn't know. I thought I couldn't know whether it was a prosperous nation or not, and whether I was in a thriving state or not, unless I knew who had got the money, and whether any of it was mine. But that had nothing to do with it. It was not in the figures at all," said Sissy, wiping her eyes.

"That was a great mistake of yours," observed Louisa.<sup>198</sup>

The evaluative instincts of Sissy Jupe should be what the law requires of corporate managers. Just as Sissy attempted in

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<sup>196</sup> STANLEY CAVELL, *The Conversation of Justice: Rawls and the Drama of Consent*, in *CONDITIONS HANDSOME AND UNHANDSOME* 101, 107 (1990).

<sup>197</sup> *Id.* at 108.

<sup>198</sup> DICKENS, *supra* note 1, at 62.

evaluating her "nation" to make a contextual judgment about fairness, corporate managers should be asked to make similar judgments in evaluating decisions for their firms.

### B. *The Priority of the Particular*

According to Martha Nussbaum, one of the elements of Aristotelian rationality is the priority of the particular over the general.<sup>199</sup> This means that a decisionmaker should be attuned to the details and intricacies of each situation. For one to make a decision based on a rule alone represents an impoverishment of the decisionmaking process because rules are best seen as guides to reason rather than definitive and complete sources of wisdom.<sup>200</sup> One cannot accept a single underlying rule without drastically undercutting the rationality of the decisionmaking process.

Applied to corporate law, this insight would suggest that a practice of maximizing shareholder returns in every case should not necessarily provide a definitive defense to a claim that the director breached her fiduciary duty. Indeed, directors would not be able to depend on any set of generalized rules in managing the enterprise. To borrow an Aristotelian metaphor offered by Nussbaum, such a dependence on a set of rules to guide decisionmaking would be like using a straight-edged ruler to measure the contours of a fluted column.<sup>201</sup> Instead, just as Aristotle noted that Greek architects used a flexible strip of metal to measure curved spaces, so too corporate managers should have to use flexible, contextualized decisionmaking to make proper decisions.

As an illustration, consider a shoe manufacturer that has long operated a factory in a working-class neighborhood in Boston. The relationship between the company and the neighborhood has been strong; over the years the company has made charitable contributions to build and support the neighborhood. The company indeed claims that its position in, and relationship with, the community is an important part of its corporate culture. The company's strategists have determined,

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<sup>199</sup> NUSSBAUM, *Discernment of Perception*, *supra* note 49, at 66-75.

<sup>200</sup> NUSSBAUM, *Discernment of Perception*, *supra* note 49, at 69-70.

<sup>201</sup> NUSSBAUM, *Discernment of Perception*, *supra* note 49, at 69-70.

however, that though the factory is profitable, manufacturing costs would fall and company profits would increase if the company were to move its production facilities to a southern state with lower labor costs and to a developing nation where environmental regulations are less strict. Ultimately, these moves would force many of the company's employees out of work.<sup>202</sup> The company directors then face the question of whether they should vote to maintain the production facility at its current location.

Under the existing majority rule in corporate law, it is clear what the directors are required to do. Keeping the factory in Boston will decrease profits, and directors who knowingly make decisions that fail to maximize shareholder profit have violated their legal duties.<sup>203</sup>

Under an Aristotelian-based corporate law doctrine, however, it would be less clear what the directors should do. They would not be able to make a decision based only upon which option would maximize shareholder profit. On the contrary, they would have to take care to become acquainted with many aspects of the real problem such as the real long-term cost of keeping the factory in Boston; the cost to the community of moving the factory; whether there are ways to mitigate the costs of staying or leaving; and whether the company has made implicit or explicit commitments to its employees. This analysis would not be a mathematical, Gradgrind-like calculus that the directors could consult to ensure that they reach the "correct" decision. They would be asked to make the decision like an astute human being in any other difficult circumstance—that is, through a careful and thoughtful consideration of the many particularities of the situation in order to seek a balance, a just fairness, among the parties.

In some respects, of course, the priority of the particular will make the jobs of managers and directors much more difficult than under existing law. Directors, for example, will be

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<sup>202</sup> To compare the hypothetical with the situation of Stride Rite Corporation, see Joseph Pereira, *Split Personality: Social Responsibility and the Need for Low Cost at Stride Rite*, WALL ST. J., May 28, 1993, at A3.

<sup>203</sup> See *supra* note 66-67, 173-76, and accompanying text. Because of the deference afforded the directors by the Business Judgement Rule, however, the Directors might be able to save the Boston factory if they were willing to lie about their reasons. See *supra* note 170 and accompanying text.

charged with attention to the particularities of the situation and will be unable to depend on a set rule of profit maximization. The difficulty of such attention is not surprising, however. Acting as a human being is always more difficult than acting as an automaton; it is more difficult to be a good judge than a good actuary.

### C. *The Importance of Non-financial Factors*

Another component of Aristotelian rationality is non-commensurability, i.e., the recognition that not all value can be assigned according to a single metric. A horse is more than the sum of its bones and skin and flesh and an employee is more than her output. Gradgrind recognized as much by the end of *Hard Times*. Yet under existing corporate law, directors are required to reduce all decisions to a solitary metric: the financial return to the shareholders. This is no more rational in the boardroom of a twenty-first-century corporation than in the factories of a nineteenth-century English mill town.

Such a dependence on one commensurable factor blinds the decisionmaker to other important elements of the decision. We are reminded of Louisa's ruminations upon visiting Stephen Blackpool in the hovel where he lives. She has gone there in sympathy after her husband Bounderby has fired Blackpool.

For the first time in her life Louisa had come into one of the dwellings of the Coketown Hands; for the first time in her life she was face to face with anything like individuality in connection with them. She knew of their existence by hundred and by thousands. She knew what results in work a given number of them would produce in a given space of time. She knew them in crowds passing to and from their nests, like ants or beetles. But she knew from her reading infinitely more of the ways of toiling insects than of these toiling men and women.

Something to be worked so much and paid so much, and there ended; something to be infallibly settled by laws of supply and demand; something that blundered against those laws and floundered into difficulty; something that was a little pinched when wheat was dear and over-ate itself when wheat was cheap; something that increased at such a rate of percentage, and yielded such another percentage of crime, and such another percentage of pauperism; something wholesale, of which vast fortunes were made; something that occasionally rose like a sea, and did some harm and waste (chiefly to itself), and fell again; this she knew the Coketown Hands to be. But, she had scarcely thought more of separating them into

units than of separating the sea itself into its component drops.<sup>204</sup>

Existing corporate doctrine requires managers to think about workers as Louisa admits to herself that she has considered them. That many corporate decisionmakers do not, in fact, consider workers in this way speaks to the difficulty that human beings have with living up to (or down to) what traditional corporate duties require. An Aristotelian model of corporate decisionmaking, on the other hand, would recognize the humanity of both the decisionmakers and the stakeholders by asking corporate directors to do more than simply reduce every decision to a financial one. There will often be aspects of a decision that cannot appropriately and fully be captured by a financial calculus. Some aspects of a decision might be put into financial terms, but the exclusive use of such metricity will blind the directors to other important characteristics of the decision to be weighed. Still other components of the decision will be important even if they are irreducible to financial terms, or if in financial terms they would have no net effect.

Again, an example is in order. Daniel Fischel has suggested that corporate directors should violate the law if the expected returns from doing so would outweigh the expected costs of doing so.<sup>205</sup> For example, he implies that companies should violate environmental law, say, by polluting a stream as long as the expected gains from doing so exceed the expected penalty.<sup>206</sup> Fischel may have a point. Many of us would choose to park in a "no parking" zone for a few minutes if we thought that we would not get a ticket. Similarly, perhaps we would not be upset if Federal Express required their drivers to double park whenever necessary to make an on-time delivery, so long as the company were also sure to pay any applicable fines.

But there is something Gradgrindian in the insistence on applying a cost-benefit analysis in every decision whether to break the law.<sup>207</sup> If Allied Chemical had performed such a

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<sup>204</sup> DICKENS, *supra* note 1, at 160-61.

<sup>205</sup> Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1271 (1982).

<sup>206</sup> See *id.* at 1270-71.

<sup>207</sup> Indeed, even Oliver Wendell Holmes said that it was "bad men" who made decisions based on cost-benefit analysis. See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) (As Holmes stated: "If you want to know the law and nothing else, you must look at it as a bad man, who cares only

cost-benefit analysis with regard to its decision whether to be complicit in an illegal dumping of what amounted to a devastating amount of Kepone into the James River in the early 1970s, the directors would probably have found that the shareholders were likely to benefit from such an act.<sup>203</sup> Yet few would applaud such a decision, and the failure to do so would not be on the basis of moral squeamishness. Rather, the rule of law is seen as an important public value deserving of respect from individuals and corporations alike, even if the costs of doing so are relatively low. To make a decision based on a cost-benefit analysis alone places no value at all on the importance of obedience to the law. To the extent that we believe respect for the law should play a part in corporate decisions irrespective of the impact on shareholder returns, it must be acknowledged that we must want and expect corporations to make decisions based in part on values that cannot be reduced to the only metric currently cognizable under corporate law.

One's opposition to Allied Chemical's decision would probably not be based solely on the respect for law, however. It would also likely be based on a moral judgment that no person, and no corporation, should make a decision that would cause so much—and such a kind of—harm, even if the expected benefit to shareholders were greater than the expected cost to shareholders. An Aristotelian model of corporate decisionmaking would give corporate directors the legal opportunity to act on such moral judgments. Aristotelian corporate law would recognize that a blinders-on cost-benefit analysis amounts to a childish and incomplete, if not inhumane, decision, rather than the fruition of correct decisionmaking.<sup>209</sup>

One example of a decision that could not have been made within a traditional corporate law framework is Levi Strauss & Co.'s ("LS & Co.") decision to withdraw from participation in the Chinese market. It is clear that China provides one of the largest markets for consumer goods in the world and promises to grow even more dominating as the years pass.<sup>210</sup> Yet sev-

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for material consequences.").

<sup>208</sup> See ROBERT H. ABRAMS, ET AL., *ENVIRONMENTAL LAW AND POLICY: A CASE-BOOK ON NATURE, LAW AND SOCIETY*. 42-48; 160-62; 336-41 (1991). Allied's criminal fine totaled a little over \$13 million. See *id.* at 341.

<sup>209</sup> See CASS R. SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* 137-39 (1997).

<sup>210</sup> It is estimated that China's economy is growing at a rate of more than 10%

eral years ago, after months of deliberation, LS & Co.'s board of directors decided to end the manufacture and sale of its jeans in China because of the Chinese government's persistent record of human rights abuses.<sup>211</sup> The company decided that the millions of dollars of profits that would be gained from participating in the Chinese market were not worth its identification with, and implicit support of, a despotic and authoritarian state.

LS & Co.'s decision would not have been possible for a company subject to traditional fiduciary duty doctrine, rigorously and honestly applied. The decision surely cost LS & Co. and its shareholders millions of dollars. But because LS & Co. is closely held among members of the Haas family, a family which has a long tradition of corporate philanthropy and responsibility, the traditional duties were not a bar to the board's decision. The board instead was free to make a decision based on a range of factors, including the financial cost of leaving and the moral cost of staying. The directors were free to make this very difficult and troubling decision in a rational way: by balancing and weighing a number of values that were not necessarily commensurable.<sup>212</sup>

An Aristotelian model of corporate governance would make this kind of decisionmaking legally required and this kind of outcome legally permissible for all corporations. A director would not be able to defend against all accusations that she breached her fiduciary duties by showing that she had maximized the value of the company to its shareholders. As Gradgrind learned, human rationality cannot be captured within a single metric: corporate law should not force directors to act as though it could.

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per year. Arne J. de Keijzer, *Cracking the China Market*, WALL ST. J., Dec. 10, 1993, at R1. U.S. exports to China rose from \$5 billion to \$9 billion between 1990 and 1993. Joyce Bentham, Lynn Curry, and Owen Ullman, *Behind the Great Wall*, BUS. WK. 43 (Oct. 25, 1993).

<sup>211</sup> See Jane Palley Katz, *Levi Strauss & Co.: Global Sourcing (A)*, Harv. Bus. Sch. Case Study (1995); Jane Palley Katz, *Levi Strauss & Co.: Global Sourcing (B)*, Harv. Bus. Sch. Case Study (1995).

<sup>212</sup> Jane Palley Katz, *Levi Strauss & Co.: Global Sourcing (A)*, *supra* note 211, at 1-3.

#### D. *The Absence of a Supreme Stakeholder*

If we put these components of Aristotelian corporate law together, we derive another component of an Aristotelian corporate law. If well-made decisions focus on the particular rather than the general and take into account a variety of different and incommensurable values and goods, it will also be the case that no single stakeholder can be considered supreme. Directors cannot be fully rational in their decisionmaking and always make a decision based on what is good for one constituency of the corporation. Some decisions, when well made, will likely benefit shareholders most. Others, when well made, will result in a greater benefit to creditors, customers, workers, or the communities where the company does business. But it will not be the case that one group will win out in every case.

In the small town of Waterville, Maine, a mostly female work force has been sewing Hathaway shirts for over 150 years.<sup>213</sup> In early 1995, Linda Wachner, the Chief Executive Officer of The Warnaco Group, Inc., Hathaway's parent company, went to Waterville to quell fears among the 500 Waterville workers of an imminent plant closing. But sales of Warnaco's various brands were booming and the stock price was soaring.<sup>214</sup> According to one account, Wachner assured Waterville workers that she "would not close the plant" if the employees "would do quality work and bring the cost of the shirt down."<sup>215</sup>

After Wachner's reassurances, the plant's employees forfeited a pay raise to help pay consultants brought to Waterville to teach them how to work more efficiently. The employees' union persuaded the company to adopt a joint labor-management program to address workplace problems and improve productivity.<sup>216</sup> By March 1996, the plant's employees had dou-

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<sup>213</sup> Adam Zagorin, *Short-Shirted in Maine*, TIME, June 3, 1996, at 58.

<sup>214</sup> See *id.* In fact, as of February, 1997, Warnaco's stock had achieved a five-year average return of over 19%, the second-best within its industry group (apparel-clothing and fabrics). See *Industry-by-Industry, Who Leads the Field in Shareholder Returns*, WALL ST. J., Feb. 27, 1997, at R4 (table).

<sup>215</sup> See Sara Rimer, *Fall of a Shirtmaking Giant Sakes Its Hometown*, N.Y. TIMES, May 15, 1996, at A14.

<sup>216</sup> See *Union Efforts to Increase Productivity Not Enough to Keep Warnaco Plant Open*, DAILY LABOR REPORT, May 21, 1996 [hereinafter *Union Efforts*].



bled the factory's productivity.<sup>217</sup> The productivity consultant claimed that the employees had "turned the plant around."<sup>218</sup> Warnaco, in the meantime, recorded unprecedented profits.<sup>219</sup>

On May 6, 1996, however, Wachner announced that Warnaco would quit making the Hathaway line and either sell or scrap the Waterville plant. Hathaway shirts were not keeping up with Warnaco's other, more profitable, product lines.<sup>220</sup> The Waterville workers were shocked. The chief steward of the local union said that the announcement of the closing was "totally, totally, unexpected."

What is interesting for present purposes is that Wachner defended the decision by saying that the factory was "not making money, and we're in the business of operating for a profit."<sup>221</sup> Closing the plant was the right thing for "the company and the stockholders."<sup>222</sup> By focusing on the concerns of the shareholders, Wachner made the decision on the correct basis according to traditional corporate law.<sup>223</sup>

Of course there may be more to Warnaco's decision than that which appeared in the newspapers, and it is difficult to evaluate the decision without access to more particulars of the case. But the stated exclusivity of focus on the shareholders exemplifies the Gradgrind-like irrationality of placing one stakeholder above all others. The workers in Waterville had a long-term relationship to the company; they had made sacrifices for the plant's success; the company had made assurances to them; the factory was apparently doing relatively well. But none of these things was said to matter when compared to the need for the shareholders to make higher profits elsewhere.

This is not what Aristotle or Dickens would consider good decisionmaking. If any one of us, as an individual, were to be faced with a similar decision—a decision that would affect many people with whom we had a long-term relationship—we

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<sup>217</sup> See Rimer, *supra* note 215, *Union Efforts*, *supra* note 216.

<sup>218</sup> See Rimer, *supra* note 215.

<sup>219</sup> See *Union Efforts*, *supra* note 216.

<sup>220</sup> See Rachel Spevack, *Hathaway Jobs in Jeopardy*, DAILY NEWS RECORD, May 7, 1996, at 1.

<sup>221</sup> See Rimer, *supra* note 215.

<sup>222</sup> See Rimer, *supra* note 215.

<sup>223</sup> For an argument that Warnaco may have committed fraud on its employees, see Kent Greenfield, *The Unjustified Absence of Federal Fraud Protection in the Labor Market*, 107 YALE L.J. 715, 721 n.26 (1997).

would be likely, almost naturally, to make a decision based on a balancing of many particulars. We would not simply choose one group and make a decision based on what was best for that group. If we did so we would be considered obtuse, or childish. Yet this is what corporate law requires of directors. A set of corporate fiduciary duties based on a notion of Aristotelian rationality would protect corporate directors from a legal obligation to act in such an obtuse and childish way.

#### E. *Process-Based Review*

There is no doubt that an Aristotelianism-based fiduciary duty doctrine would call for a more careful, probing, and sensitive decisionmaking process than that required by the existing utilitarian-based fiduciary duty doctrine. Such a change in the underlying duty would require that those who monitor corporate decisionmakers, particularly courts, adjust the process of reviewing corporate decisions.

Courts are called on to monitor the decisions of corporate decisionmakers in the context of derivative suits brought by disgruntled shareholders. Because of the business judgment rule, a court's review of these decisions is typically quite superficial, unless there is some reason to suspect a conflict of interest on the part of directors.<sup>224</sup> Even though the underlying duty of corporate managers—to maximize the value of the company to the shareholders—is quite substantive, the court's review of corporate decisions generally focuses on processes. Ostensibly because of the court's stated hesitancy to substitute its own judgment for the judgment of the directors, the court instead looks to whether the decision was made after due consideration, after consultation with experts, and with appropriate notice.<sup>225</sup>

Under an Aristotelian fiduciary duty doctrine, judicial review of corporate decisions would likely also be process based. The very nature of Aristotelian decisionmaking would make the substantive review difficult since courts would have less access to, and less understanding of, the particularities in-

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<sup>224</sup> See CARY & EISENBERG, *supra* note 195, at 603.

<sup>225</sup> The paradigm case is *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985). See also CARY & EISENBERG, *supra* note 195, at 602-05, 631.

volved in each decision. But courts would not be helpless. Just as a well-made decision under traditional criteria tends to have certain procedural characteristics (consultation with experts, due consideration, notice), a well-made decision under Aristotelian criteria will tend to have certain procedural characteristics as well. These procedural characteristics could be used by courts as guideposts to evaluate whether directors had satisfied their fiduciary duties.

The procedural characteristics of a well-made decision within the new regime would flow from the substantive characteristics. If directors are genuinely concerned about the particularities of each decision, they will have available detailed information about the various aspects and effects of the decision. If directors recognize that some values cannot be captured fully by financial data and cannot be reduced to impact on the bottom line, they will consider a range of other types of information. If directors truly are concerned about the impact of their decision on stakeholders other than shareholders, they will consider and weigh such impacts. Indeed, as boards of directors typically include strong advocates of shareholder interests, perhaps boards governed by an Aristotelian fiduciary duty doctrine would find it useful to invite representatives of other stakeholders to be among their members.<sup>226</sup> The contours of these procedural characteristics would have to be developed over time by common law courts, just as the procedural requirements under traditional doctrines have been spelled out over time by common law courts.<sup>227</sup>

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<sup>226</sup> Cf. CHRISTOPHER D. STONE, *WHERE THE LAW ENDS* (1975) (advocating "public interest directors" for the boards of major public corporations).

<sup>227</sup> To expect companies to engage in this kind of decisionmaking is not unreasonable. Consider again Levi Strauss & Co., which has implemented a company-wide decisionmaking process that incorporates many of these Aristotelian notions. In order to further its commitment to ethical decisionmaking within the corporate setting, LS & Co. has adopted the "principled reasoning approach" as the paradigm for all of its decisionmaking. The "PRA" involves six discrete steps: (1) defining the problem; (2) agreeing on the principles to be satisfied; (3) identifying both high-impact and high-influence stakeholders and assessing their claims; (4) brainstorming possible solutions; (5) testing the consequences of chosen solutions; and (6) developing an ethical process for implementing the solution. As explained by Robert Dunn, Vice President of Corporate Affairs,

If there is anyone with a moral claim on the outcome [of a decision], their views have to be clear and present. The principled reasoning approach insists that we identify the ethical issues, the people who are

To the extent that an Aristotelian notion of fiduciary duty imposes a different, greater, and more difficult set of duties, the cost of monitoring the behavior of directors will likely increase.<sup>228</sup> But one would expect to see more rational decisionmaking under an Aristotelian regime; the real question would be whether the improvement in rationality would offset the increase in monitoring costs. Moreover, nothing in the Aristotelian regime would prevent the capital market from working its inexorable influence, for better or for worse, on the decisionmaking processes of corporations. Because shareholders can always vote with their feet, one should not expect that a transition to an Aristotelian regime of corporate law would turn companies into eleemosynary institutions.

But the Aristotelian might propose that the traditional focus on the cost to shareholders of monitoring the behavior of directors is characterized by the same faults of narrowness and irrationality as traditional corporate law doctrine. The cost to shareholders of monitoring directors' behavior may indeed increase. But that is not the sole concern. It is also important to acknowledge that directors, acting through their corporations, have long affected a wide range of stakeholders, and law has prevented them from taking such impacts into account. An Aristotelian-inspired version of corporate fiduciary duties would require directors to take into account these other stakeholders, and—if the duties were to mean anything—would give these other stakeholders some way to enforce these duties.<sup>229</sup> So while monitoring costs to shareholder will increase, monitoring costs to stakeholders will decrease. That is, under present doctrine, workers or communities or creditors have no legal standing to monitor the decisionmaking of the directors. Monitoring costs are quite high, if not infinite.<sup>230</sup> Under an Aristotelian regime, they will have the legal

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affected, the possible solutions, and the ways to minimize harm. At the beginning, people are frustrated with the process, but at the end they feel it serves us well. It prevents the pressure of the moment, of personal involvement from getting in the way. Over time, people do it more naturally.

Jane Palley Katz, *Levi Strauss & Co.: Global Sourcing (A)*, *supra* note 211, at 6.

<sup>228</sup> See EASTERBROOK & FISCHER, *supra* note 81, at 38, 90-93.

<sup>229</sup> Again, this is not so outlandish. See *Francis v. United Jersey Bank*, 432 A.2d 814 (N.J. 1981) (affording creditor right to sue individual director for alleged breach of duty of care owed to creditor).

<sup>230</sup> For an argument that employees (like shareholders) bear costs of monitoring

right to monitor directorial duties and some ability to enforce them; therefore, monitoring costs for these groups will fall. Thus, the key question, from the standpoint of monitoring costs, would be whether the increase of monitoring costs to shareholders would be offset by the decrease in monitoring costs to other stakeholders.

## CONCLUSION

As Dickens and Aristotle tell us, to have one's decisions depend on the calculus of utilitarianism is irrational. Yet within corporate law, the fiduciary duties of managers and directors require them to make decisions based on the very principles—commensurability and maximization—that Dickens and Aristotle criticized so powerfully. This Article has argued that the business judgment rule has sprung up as a corrective to the irrationality of the underlying duty of maximizing shareholder returns. It is as if the law could admit to the words of Louisa Gradgrind: "With a hunger and thirst upon me, father, which have never been for a moment appeased; with an ardent impulse towards some region where rules, and figures, and definitions were not quite absolute; I have grown up, battling every inch of my way."<sup>231</sup> The adoption of the business judgment rule has been an important part of this battle. This Article has also suggested, however, that corporate law could be brought still closer to the norms of good decisionmaking suggested by Aristotle and Dickens.

We must make one important concession. While we believe that corporate law indeed asks corporate managers to make decisions in an impoverished, irrational way, we admit that rationality is not necessarily the sole test for public policy. Sometimes it is better to have a rule, even if it is a very simple, childish rule, than to offer discretion, especially if the people who have responsibility for acting do not have the "practical wisdom" necessary for making good decisions without set rules.<sup>232</sup> The proper test for deciding the contours of

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whether management serves their interests, see Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. REV. 283, 299-303 (1998).

<sup>231</sup> DICKENS, *supra* note 1, at 217.

<sup>232</sup> NUSSBAUM, *Discernment of Perception*, *supra* note 49, at 73.

corporate fiduciary duty doctrine should mirror the test for most other public policies: which set of legal rules gets us closer to the kind of society we want.<sup>233</sup> Corporate law does not exist in a vacuum of academic thought any more than in the thin air of corporate boardrooms. To decide whether we, as a society, want to retain existing corporate doctrine or move to something more rational, we must decide whether society as a whole is better off when corporate directors have the legal duty to maximize profits or when they have the legal duty to take into account the needs and desires of others affected by the decision. This is in part an empirical question, in part a political question, and in part a moral question. And it is not only for lawyers, corporate executives, or shareholders to answer.

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<sup>233</sup> For a more thorough defense of this point, see Greenfield, *supra* note 178, at 21-25.

